

1 MARVIN MCELROY, C73869
2 AVENAL SP
3 PO BOX 3
4 AVENAL, CA 93204

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6
7 UNITED STATES DISTRICT COURT
8 FOR THE
9 NORTHERN DISTRICT OF CALIFORNIA

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12 MARVIN MCELROY
13 Plaintiff

14 v
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16 CALIFORNIA DEPARTMENT OF
17 CORRECTIONS AND REHABILITATION, et al.;
18 WILLIAM GAUSEWITZ, DIRECTOR OF CDCR;
19 AVENAL STATE PRISON, et al.;
20 JAMES HARTLEY, CHWARDEN OF ASP;
D. ARUNE; J. BOSTON; G. SIMON; M. NERI;
D. JACKSON; CIDS HARRIS AND ROCHA,
Defendants.

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FILED
JUN 12 2008
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-filing

VRW

CV 08 2936

Case No. _____

COMPLAINT UNDER THE
CIVIL RIGHTS ACT
42 USC §1983 AND
DEMAND FOR JURY TRIAL

(PR)

008-0926 VRW

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1 MARVIN McELROY, C-73869
2 AVENAL SP
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7 UNITED STATES DISTRICT COURT
8 FOR THE
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13 MARVIN McELROY,
14 Plaintiff,

Case No. _____

15 v.
16 CALIFORNIA DEPARTMENT OF
17 CORRECTIONS AND REHABILITATION et al,
18 WILLIAM G. AUSEWITZ, DIR. OF CORRECTION;
19 AVENAL STATE PRISON (ASP) et al,
20 J.D. HARTLEY (A) WARDEN OF ASP;
DARLINE CAPTAIN OF ASP; LT J. BOSTON;
SGT G. SIMON; C/O T. DEEGAN; C/O D.
JACKSON; C/O M. NERI; C/O HARRIS; C/O
ROCHA.

COMPLAINT UNDER THE CIVIL
RIGHTS ACT 42 USC § 1983 AND
DEMAND FOR JURY TRIAL

Defendant(s)

I. JURISDICTION

1. THIS IS A CIVIL ACTION AUTHORIZED BY 42 USC § 1983 TO REDRESS
THE DEPRIVATION, UNDER THE COLOR OF STATE LAW, OF THE RIGHTS SECURED
BY THE CONSTITUTION OF THE UNITED STATES.

2. THIS COURT HAS JURISDICTION OVER PLAINTIFF'S FEDERAL CLAIMS
UNDER 28 USC §§ 1331 and 1333(a)(3).

1 3. PLAINTIFF SEEK DECLARATORY RELIEF PURSUANT TO 28 U.S.C §§
2 2201 AND 2202

3 4. PLAINTIFF'S CLAIM FOR INJUNCTIVE RELIEF ARE AUTHORIZED BY 28 U.S.C.
4 §§ 2283 AND 2284, AND RULE 65 OF THE FEDERAL RULES OF CIVIL PROCEDURE

5 5. THIS COURT ALSO HAS JURISDICTION OVER PLAINTIFF'S STATE LAW
6 CLAIMS UNDER 28 U.S.C. § 1337.

II VENUE

7 6. THE NORTHERN DISTRICT OF CALIFORNIA IS AN APPROPRIATE
8 VENUE UNDER 28 U.S.C. § 1339(b)(1) BECAUSE THE DIRECTOR OF CDCR IS
9 IN NORTHERN CALIFORNIA.

III ADMINISTRATIVE REMEDIES

10 7. PLAINTIFF HAS FILED SEVERAL INMATE APPEALS IN REGARD TO
11 THE MATTERS MENTIONED HEREIN THIS COMPLAINT, THAT HAVE GONE
12 UNANSWERED; AND FURTHER DELAY WILL MORE THAN LIKELY CAUSE
13 PLAINTIFF TO CONTINUE TO SUFFER FURTHER HARM.

14 PLAINTIFF FURTHER CONTENTS THAT PRESSING THE ISSUE WILL
15 ONLY INSIGHT FURTHER RETALIATION. ANGRY PRISON OFFICIALS CAN
16 GET AWAY WITH A LOT.

IV PARTIES

A. PLAINTIFF

17 8. PLAINTIFF, MARVIN McELROY, CDCR# C-73869, IS/WAS AT ALL TIMES
18 MENTIONED HEREIN IS/WAS A PRISONER OF THE STATE OF CALIFORNIA
19 IN THE CUSTODY OF THE CDCR, AND IS CURRENTLY CONFINED AT ASP.

B. DEFENDANT(S)

20 9. DEFENDANT, WILLIAM GIUSEWITZ IS THE DIRECTOR OF CDCR. HE
21 IS LEGALLY RESPONSIBLE FOR THE OVERALL OPERATION OF THE DEPARTMENT
22 AND EACH INSTITUTION UNDER ITS JURISDICTION INCLUDING ASP WHERE
23 McELROY IS CONFINED. HE IS THE FINAL POLICY MAKER OF CDCR.

10. DEFENDANT, JAMES D. HARTLEY, IS THE WARDEN OF ASP. HE IS ASP'S
FINAL POLICY MAKER WHO IS LEGALLY RESPONSIBLE FOR THE OPERATION OF ASP
AND FOR THE WELFARE OF EACH INMATE AT ASP.

11. DEFENDANT, D. ARLINE, IS THE CAPTAIN OF ASP'S FACILITY THREE. HE IS
POLICY MAKER WHO IS LEGALLY RESPONSIBLE FOR THE OPERATION OF ASP AND FOR
THE WELFARE OF EACH INMATE AT ASP.

12. DEFENDANT LIEUTENANT J. BOSTON (BADGE #53827) IS A SUPERVISORY
WHO IS RESPONSIBLE FOR THE OPERATION OF ASP AND FOR THE WELFARE OF
EACH INMATE AT ASP.

13. DEFENDANT SGT G. SIMON (BADGE #60967) IS A SUPERVISORY OFFICIAL WHO IS
RESPONSIBLE FOR THE OPERATION OF ASP AND FOR THE WELFARE OF EACH INMATE, AT
ASP.

14. DEFENDANT(S) C/Os T. DEEGAN (BADGE #51852), D. JACKSON (BADGE #73774), M.
NERI (BADGE #63395), HARRIS AND ROCHA ARE PROPERLY TRAINED CORRECTIONAL
OFFICERS WHO RESPONSIBLE FOR THE SAFE CUSTODY OF THE INMATES
CONFINED IN THE INSTITUTION OR THE DEPARTMENT OF CORRECTIONS
AND REHABILITATION.

15. EACH DEFENDANT, IS SOED IN THEIR INDIVIDUAL AND IN THEIR OFFICIAL
CAPACITIES.

16. AT ALL TIMES MENTIONED HEREIN THIS COMPLAINT THE DEFENDANTS
HAVE AND CONTINUE TO ACT UNDER THE COLOR OF STATE LAW.

II STATEMENT OF FACTS

17. AT ALL TIMES MENTIONED HEREIN THIS COMPLAINT THE PLAINTIFF,
MARVIN McELROY, CDCR#C-73869 IS AND OR WAS AN INMATE IN THE CARE, THE
CUSTODY, THE SAFEKEEPING AND CONTROL OF CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION'S OFFICIALS, STAFF / PERSONNEL WHILE
INCARCERATED AT AVENAL STATE PRISON.

18. The Plaintiff, Marvin McElroy, was transferred from OVSP to MCSP
 1 JULY 29, 1993 AFTER PRISON AUTHORITIES LEARNED OF A THREAT TO MARVIN'S
 2 LIFE. BECAUSE HE CAME TO THE ASSISTANCE OF LIEUTENANT GIOTTONINI
 3 WHILE HE WAS UNDER ATTACK FROM ANOTHER INMATE, ON JULY 6, 1993. ON
 4 SEPTEMBER 2, 1993, WARDEN IVALEE HENRY GAVE MR MCELROY A LETTER OF
 5 COMMENDATION FOR HIS SUCCESS IN CURTAILING THE STAFF ASSAULT, AT
 6 WHICH TIME HE WAS FURTHER ENDORSED AND RETAINED IN SNY DUE TO
 7 ONGOING ENEMY CONCERNS

9 MR MCELROY HAS BEEN INCARCERATED NOW OVER 26 YEARS, AND HAD ONLY
 10 RECEIVED TWO WRITE-UPS PRIOR TO BEING TRANSFERRED TO ASP IN NOV'D7,
 11 THAT TOOK PLACE INSPIRE OF AN EXPIRED GYM EXCLUSION CHRONO, FOR
 12 MENTAL CONDITION, THAT PRISON OFFICIALS FAILED TO RENEW, EVEN THOUGH
 13 THE ISSUE HAD BEEN RAISED, WITH MR DLSON HIS PSYCHE CASE WORKER AT
 14 MULE CREEK.

15 SINCE MR MCELROYS ARRIVAL AT ASP, HIS REQUEST TO DR. OLSEN FOR
 16 REEVALUTION OF PLACEMENT AT ASP, AND TO HAVE THE GYM EXCLUSION
 17 CHRONO REINSTATED HAVE GONE IGNORED, HE HAS ALSO BEEN ASSAULTED
 18 BY TWO INMATES, THAT CUSTODY OFFICERS HARRIS AND ROCHA ALLOWED TO
 19 ESCAPE AFTER BRAKING MARVIN'S WRIST; AND LATER OFFICERS JACKSON
 20 AND NERI DRAGGED HIM KICKING, SCREAMING AND YELLING, BY MARVIN'S
 21 BROKEN WRIST AND ELBOWS IN HANDCUFFS ACROSS THE INSTITUTION BACK
 22 TO THE YARD, WHILE DISREGARDING HIS ENEMY CONCERNS OF THE ONES
 23 THAT GOT AWAY.

24 AS A RESULT OF THIS CHAIN OF EVENTS, MARVIN NOW SUFFERS A LOSS OF
 25 MOBILITY IN HIS RIGHT HAND AND WRIST, POST TRAUMATIC STRESS
 26 DISORDER AND HAS SUBSEQUENTLY BEEN PLACED IN THE ENHANCED
 27 OUTPATIENT (EOP) PROGRAM AT AVENAL STATE PRISON

1 A. EXCESSIVE USE OF FORCE

2 19. MARCH 14, 2008 ABOUT 14:45 HRS IN CELL#1 OF THE OUT-PATIENT HOUSING
 3 UNIT (OHU), MR. McELROY SAT REMERGING, C/O LOPEZ'S LECTURE FOR ORIENTATION THE
 4 DAY HE ARRIVED (NOV. 21, 2007), WHEN SHE CAUTIONED INMATES TO STAY OUT OF
 5 TROUBLE BECAUSE ASP ONLY HAS TWO SNY YARDS, SO INMATES CAN'T TRANSFER TO/
 6 FROM ONE YARD TO THE OTHER TO GET AWAY FROM ENEMIES OR GAMBLEING
 7 DEBTS BECAUSE KITCHEN WORKERS FROM BOTH YARDS INTERMINGLE AND DO FAVORS
 8 FOR EACH OTHER.

9 SO WHEN DEFENDANT DEEGAN TOLD MR. McELROY THEY WERE REHOUSING HIM ON
 10 THE 3 YARD (/FA3) HE IMMEDIATELY FEARED FOR HIS LIFE AND SAFETY, CAUSE HE IS
 ^{NOT}
 11 NOLONGERABLE TO DEFEND HIS' DUE TO A BROKEN WRIST, FROM A FIGHT ON 4
 12 YARD THAT DEFENDANTS HARRIS AND ROCHA OF ASP-HU42D ON JANUARY 26, 2008, LET
 13 MR. McELROYS ATTACKERS FLEE; AND THEY HAVE NOT YET BEEN IDENTIFIED (SEE RVR
 14 F4-08-01-044 [EXHIBIT 'H'] MARVIN McELROY DECLARATION #2) (see also UPSHAW DECLARATION)

15 MR. McELROY THEN ATTEMPTED TO CONVEY HIS FEARS AND SAFETY/ENEMY
 16 CONCERN TO DEFENDANT DEEGAN, AND SHOWED HIM THE PINS IN HIS RIGHT WRIST, TO
 17 HOLD IT TOGETHER AND THAT HE WAS DEFENSELESS (SEE EXHIBIT A, INCIDENT REPORT #
 18 ASP-FA3-DB-03-007D, PG 184 AT Ln. 12 [T. DEEGAN]).

19 AFTER FURTHER DISAGREEMENT DEEGAN CALLED DEFENDANT, LT. BOSTON WHO TOLD
 20 HIM TO WAITE FOR DEFENDANT SGT G. SIMON; BUT DEEGAN TRIED TO FURTHER CONVINCE
 21 MR. McELROY THAT IF WENT TO FA3-PROGRAM OFFICE HE COULD "VOICE" HIS CONCERN THERE.
 22 MR. McELROY CONTINUED TO REFUSE, AND THEN SHOWED HIM AGAIN.

23 DEFENDANT SIMON ARRIVED AT OHU CELL #1 AND OBSERVED DEEGAN "TRYING TO
 24 CONVINCE" MR. McELROY TO GO TO FA3, WITH NO RESPONSE. AFTER SPEAKING WITH
 25 DEFENDANT BOSTON, THE DEFENDANTS RETURNED TO THE CELL AND INFORMED MR.
 26 McELROY OF THEIR ORDERS TO ASSEMBLE AN EXTRACTION TEAM TO REMOVE HIM
 27 FROM THE CELL. MR. McELROY THEN LAYED DOWN AND "HUGGED THE SEAT" AND
 28 TOLD THE DEFENDANTS "NO, NO PLEASE DON'T".

1 "INMATE M^CELROY", DEEGAN STATES "APPEARED TO BE IN AN [ALTERED] STATE OF MIND BY
 2 THE VISIBLE SHIVERING OF HIS BODY, THE MORE PRONOUNCED VEINS..." Id at PG 384;
 3 THE DEFENDANT ORDERED MR M^CELROY "TO RELEASE" HIS GRIP FROM THE BENCH, WITH
 4 NO RESULTS. WHILE PULLING OUT HIS PEPPER SPRAY, HE GRABBED AND JERKED MR.
 5 M^CELRODYS INJURED RIGHT ARM. M^CELROY IN PAIN LOUDLY YELLED "NO"; TRYING TO EASE
 6 THE PAIN DEEGAN WAS CAUSING, HE LEANED TOWARD DEEGAN AS HE JERKED HIS ARM,
 7 THE DEFENDANT PEPPER SPRAYED MR M^CELROY. HIS SKIN AND EYE SHUT AND BURNING MR.
 8 M^CELROY LET OUT A SCREAMING CRY FOR HELP AS SNOT POURED UNCONTROLLABLY FROM
 9 HIS NOSE. THE DEFENDANT INCITING ORDERED MR M^CELROY TO LET GO AND JUST
 10 TO "DO AS YOUR TOLD". HOWEVER NOW BLIND, IN SHOCK GASPING FOR AIR AND COMPLETELY
 11 OVERWHELMED WITH FEAR AND EXHAUSTION MARVIN HELD ON FOR HIS LIFE SHIVERING WITH
 12 TERROR, NOT APPARENT SAYING ANYTHING JUST LISTENING TO THE GURGLE OF WHAT
 13 HE BELIEVE WOULD SOON BE HIS FINAL BREATH; ALTHEWHILE DEFENDANT SIMON STOOD
 14 WATCHING AS HE TALK WITH BOSTON, IN BETWEEN MARVIN'S CRIES, ON THE PHONE (SEE EXHIBIT
 15 B, INCIDENT REPORT #ASP-F43-08-D3-0070 [G. SIMON]; SEE ALSO EXHIBIT A, INCIDENT REPORT id.)
 16 20. OFFICER LIPPER WHO WAS FAMILIAR WITH MR M^CELROY TOLD HIM THAT HE WOULD
 17 BE TAKEN TO A^D SEGI; SO MR M^CELROY COMPLIED WITH HIS ORDERS AND STOOD UP AND
 18 SUBMITTED TO RESTRAINTS "WITHOUT INCIDENT" (SEE EXHIBIT C et seq.).

19 AT APPROXIMATELY 16:10 HRS DEFENDANTS M. NERI AND D.F. JACKSON APPROACHED
 20 MR M^CELROY, NOW SITTING COMPLY IN A WHEELCHAIR "... OFFICER NERI AND I ...
 21 BEGAN TO ESCORT HIM... ONCE WE APPROACHED THE FACILITY 3 PLAZA GATE M^CELROY
 22 BEGAN RESISTING AND YELLING 'I AM NOT GOING BACK TO THE YARD, I AM NO GOING
 23 BACK.' OFFICER NERI AND I [L]IFTED M^CELROY HIGHER TO GAIN CONTROL..." (SEE
 24 EXHIBIT 'C' RVR #F3-08-D3-013 [I.E REPORT], STAFF WITNESS #3 at PG 384). M^CELROY
 25 UNABLE TO GAIN ANY FOOTING BEGAN YELLING, WHILE THEY DANCED HIM ALONG,
 26 TILL HE LOST HIS FOOTING COMPLETELY; AND THE DEFENDANTS THEN DRAGGED
 27 HIM WHILE SCRAPPING HIS KNEES ALL THE WAY ACROSS THE PLAZA TO FA3 SUPPORT
 28 OFFICE AS DEFENDANTS CAPTAIN ARLINE, LT BOSTON AND SGT SIMON FOLLOWED

1 TILL HE WAS DROPPED IN FRONT OF THE OFFICE DOOR (SEE EXHIBIT E, RVR # F3-
2 08-03-013 et seq)

3 21. SOON AFTER MEDICAL ~~WERE~~ STAFF ORDERED TO RETRIEVE A BEWILDERED
4 WIMPERING MARVIN FROM THE OFFICE DOORWAY, AND TO TAKE HIS VITALS ^{W/WRIST} INSIDE
5 THE MEDICAL BUILDING.

6 WHILE THE NURSE WAS TAKING HIS VITALS HE WAS GIVEN AN ORDER TO
7 STAND-UP. McELROY STILL BLIND FROM THE PEPPER SPRAY, TRIPPED ON THE
8 WHEELCHAIR LEG REST AND STUMBLED FORWARD. THE DEFENDANTS TACKLED
9 HIM AND SHOVED THE ONCE EXPOSED PINS HOLDING TOGETHER HIS WRIST, ALL
10 THE WAY INTO THE BONE BENEATH HIS SKIN. McELROY COULD DO NOTHING BUT
11 CRY OUT IN PAIN "YOU BROKE MY WRIST!"

12 B. C/O'S HARRIS AND ROCHA'S FAILURE TO PROTECT

13 22. JANUARY 26, 2008 DEFENDANTS HARRIS AND ROCHA OBSERVED McELROY
14 BEING ASSAULTED BY TWO OTHER INMATES IN THE BACK OF ASP-FA4-HU420.

15 THEY ALLOWED THIS ATTACK TO MIGRATE ALL THE WAY TO THE
16 FRONT OF THE BUILDING BEFORE SOUNDING THE ALARM.

17 FURTHERMORE, THEY ALLOWED HIS ATTACKER TO GET AWAY; IN A
18 LOCKED BUILDING HOUSING APPROX. 200 INMATES.

19 MR M^EELROY'S ATTACKER CALLED HIM A "COP", AND IT IS UPON
20 INFORMATION AND BELIEF, AND THEREON ALLEGED, THAT HIS ATTACKERS
21 WERE REFERING TO THE AFORE MENTIONED "LETTER OF COMMENDATION" HE
22 RECEIVED FOR COMING TO THE AIDE OF LIEUTENANT GIOTTONINI (SEE
23 EXHIBIT 'I', LETTER OF COMMENDATION (SEP-93)); (SEE ALSO EXHIBIT 'H', M^EELROY
24 DECLARATION, AND RVR # F4-08-01-044).

25 C. FAILED ATTEMPTS OF RAISING MENTAL HEALTH ISSUES

26 23. THROUGHOUT THE YEARS, MR M^EELROY HAS BEEN ^{GIVEN} SPECIAL HOUSING
27 CONSIDERATIONS FOR VARIOUS REASONS; MAINLY STRESS RELATED (SEE EXHIBIT
28 'J', GYM EXCLUSION CHRONO; EXHIBIT 'K', SINGLE CELL; SEE ALSO EXHIBIT 'L', SINGLE CELL).

1 MR. MCELROY HAS A WELL DOCUMENTED HISTORY OF STRESS DISORDER
 2 AND OF ANXIETY CAUSED BY HIS INCARCERATION (SEE EXHIBIT 'L' ET SEQ.).

3 MR MCELROY'S HOUSING ISSUES WEREN'T OF CONCERN WHILE AT MCSP.
 4 HOWEVER UPON INFORMATION OF HIS TRANSFER TO ASP, HE IMMEDIATELY
 5 RAISED HIS CONCERNS WITH MR. OLSON HIS PSYCHE CASEWORKER AT MCSP
 6 AND ATTEMPTED TO POSTPONE HIS TRANSFER TILL HIS CHRONOS WERE
 7 UPDATED; BUT HIS PROPERTY WAS PACKED IT WAS TO LATE. FURTHERMORE HE
 8 HAS SUFFERED A BROKEN LEG AS WELL, AFTER BEING ATTACKED FOR HIS
 9 ASSISTANCE TO AN OFFICER (SEE EXHIBIT 'M' ET SEQ.).

10 SINCE HIS ARRIVAL AT ASP HIS REQUEST TO DR OLSEN, AND OTHER ASP
 11 PSYCHE TEAM DR(S), FOR REVIEW OF HIS PLACEMENT HERE, AND TO HAVE HIS
 12 GYM EXCLUSION CHRONO UPDATED HAVE BEEN IGNORED. NOR DID THEY RAISE
 13 THESE ISSUES AT HIS INITIAL CLASSIFICATION COMMITTEE HEARING AT ASP.

14 VI CLAIMS FOR RELIEF

15 A. FEDERAL CLAIMS FOR RELIEF

16 ① VIOLATION OF PRISONER'S EIGHTH AMENDMENT RIGHT TO 17 BE FREE FROM THE USE OF EXCESSIVE FORCE

18 24. PLAINTIFF REALLEGES AND INCORPORATES BY REFERENCE EACH
 19 ALLEGATION OF PARAGRAPH 1 THROUGH 23, INCLUSIVE, AS IF ALLEGED HEREIN.

20 25. DEFENDANTS DEEGAN AND SIMON AND BOSTON VIOLATED MR MCELROYS
 21 EIGHTH AMENDMENT RIGHT TO BE PROTECTED FROM CRUEL AND UNUSUAL
 22 PUNISHMENT IN THE FORM OF EXCESSIVE FORCE, BY THEIR UNNECESSARY AND
 23 WANTON INFILCTION OF PAIN, INCLUDING PHYSICAL INJURY AND PSYCHOLOGICAL AND
 24 EMOTIONAL DISTRESS, AS HEREIN ALLEGED.

25 26. SPECIFICALLY, DEFENDANT, DEEGAN KNOWINGLY, MALICIOUSLY AND SADISTICALLY
 26 INFILCTED PHYSICAL, EMOTIONAL, AND MENTAL ABUSE UPON MR. MCELROY WHEN
 27 HE GRABBED AND JERKED ON HIS BROKEN ARM/WRIST AND SPRAYED HIM TWICE
 28 WITH PEPPER SPRAY AT POINT BLANK RANGE IN HIS FACE, IN FRONT OF

1 FEDERALLY PROTECTED RIGHTS.

2 31. AS A DIRECT AND PROXIMATE RESULT OF ALL OF THE DEFENDANTS ACTIONS
 3 HEREIN ALLEGED, MARVIN MCELROY SUFFERED, AND CONTINUES TO SUFFER, PHYSICAL
 4 INJURY. MARVIN MCELROY IS ENTITLED TO AN AWARD OF COMPENSATORY AND PUNITIVE
 5 DAMAGES FOR INJURIES SUFFERED.

6 32 AS A DIRECT AND PROXIMATE RESULT OF ALL THE DEFENDANTS ACTIONS HEREIN
 7 ALLEGED, MARVIN MCELROY SUFFERED, AND CONTINUES TO SUFFER, SEVERE EMOTIONAL
 8 AND PSYCHOLOGICAL DISTRESS. MARVIN MCELROY IS ENTITLED TO AN AWARD OF
 9 COMPENSATORY AND PUNITIVE DAMAGES FOR INJURIES SUFFERED.

10 33. MR MCELROY IS ENTITLED TO INJUNCTIVE RELIEF, INCLUDING, BUT NOT LIMITED TO,
 11 AN ORDER REQUIRING HIS TRANSFER AWAY FROM A SP, WHERE HE WILL NOT BE SUBJECTED
 12 TO RETALIATION INSTIGATED/RATIFIED BY ANY OF THE DEFENDANTS. THERE IS NO
 13 ADEQUATE REMEDY AT LAW TO PROTECT MR MCELROY FROM SAID RETALIATION; AND
 14 WITHOUT THE EQUITABLE RELIEF SOUGHT HE IS SUSCEPTIBLE TO GREAT INJURY.
 15 THE BALANCE OF HARSHIPS TIPS MARKEDLY TOWARD MARVIN MCELROY IN THAT THERE
 16 WOULD BE LITTLE OR NO PREJUDICE OR HARM TO THE DEFENDANTS SHOULD MR.
 17 MCELROY BE TRANSFERRED AWAY A SP, BUT GREAT HARM TO MARVIN MCELROY SHOULD
 18 HE BE REQUIRED TO STAY AT THAT INSTITUTION.

19 ② VIOLATION OF PRISONER'S EIGHTH AMENDMENT RIGHT
 20 TO BE FREE FROM THE USE OF EXCESSIVE FORCE

21 34. PLAINTIFF REALLEGES AND INCORPORATES BY REFERENCE EACH OF THE
 22 GENERAL ALLEGATIONS OF PARAGRAPHS 1 THROUGH 23, INCLUSIVE, AND PARAGRAPHS
 23 28. THROUGH 33, INCLUSIVE, OF THE FIRST CLAIM, AS IF ALLEGED HEREIN.

24 35. DEFENDANTS NERI, JACKSON, SIMON, BOSTON AND D. APLINE VIOLATED MARVIN
 25 MCELROY'S EIGHTH AMENDMENT RIGHT TO BE PROTECTED FROM CRUEL AND UNUSUAL
 26 IN THE FORM OF EXCESSIVE FORCE, BY THEIR UNNECESSARY AND WANTON INFILCTION OF
 27 PAIN, INCLUDING PHYSICAL INJURY AND PSYCHOLOGICAL AND EMOTIONAL DISTRESS, AS
 28 HEREIN ALLEGED.

1 DEFENDANT SIMON. DEFENDANTS' ACTIONS/FAILURE TO ACT OFFENDS
 2 CONTEMPORARY STANDARDS OF DECENCY.

3 27. PLAINTIFF IS INFORMED AND BELIEVES, AND THEREON ALLEGES, THAT
 4 DEFENDANTS SIMON AND LT BOSTON, KNEW THAT DEFENDANT DEEGAN WAS
 5 CAPABLE OF, AND LIKELY TO PERPETRATE SUCH OUTRAGEOUS ACT AS THE PEPPER
 6 SPRAYING OF MR MCELROY AT POINT BLANK RANGE AND THE GRABBING OF HIS
 7 BROKEN WRIST. PLAINTIFF FURTHER INFORMED AND BELIEVES, AND THEREON
 8 ALLEGES, THAT DEFENDANT ~~DEEGAN~~^{SIMON} KNEW THAT SUCH CONDUCT WOULD BE
 9 HARMFUL TO MR MCELROY OR ANY OTHER INMATE SUBJECT TO SUCH CONDUCT,
 10 YET HE ALLOWED DEFENDANT TO REMAIN IN HIS POSITION OF AUTHORITY, AND
 11 TO CARRY OUT THE OFFENSIVE BEHAVIOR. IN DOING SO, DEFENDANT SGT SIMON
 12 IMPLEMENTED A POLICY THAT REPUDIATED MARVIN MCELROYS CONSTITUTIONAL
 13 RIGHTS AND WAS UNCONSCIONABLE. UNDER THE DOCTRINE OF SUPERVISORY
 14 LIABILITY DEFENDANT SGT SIMON IS LIABLE FOR MARVIN MCELROYS INJURIES.

15 28. PLAINTIFF IS INFORMED AND BELIEVES, AND THEREON ALLEGES, THAT DEFENDANT
 16 JAMES D. HARTLEY IS IN A POSITION OF AUTHORITY SUCH THAT HE COULD ARRANGE,
 17 OR ORDER TO BE ARRANGED, A TRANSFER FOR MR MCELROY AWAY FROM A SP,
 18 WHERE MR MCELROY IS SUBJECTED TO RETALIATION AND IS FEARFUL FOR HIS WELL-
 19 BEING AND SAFETY. PLAINTIFF IS FURTHER INFORMED AND BELIEVES, AND THEREON
 20 ALLEGES, THAT IN FACT DEFENDANT HARTLEY KNOWS OF MR MCELROYS REQUESTS
 21 FOR TRANSFER, OF THE ALLEGED RETALIATION, AND OF MARVIN MCELROYS FEAR,
 22 YET DEFENDANT HARTLEY HAS FAILED AND REFUSED TO FACILITATE MR MCELROYS
 23 TRANSFER.

24 29. DEFENDANTS, ~~AND~~ EACH OF THEM, SUBJECTED MARVIN MCELROY TO THIS
 25 PHYSICAL, EMOTIONAL, AND MENTAL ABUSE UNDER CIRCUMSTANCES WHICH DID NOT
 26 REQUIRE THE USE OF PHYSICAL FORCE WHATSOEVER.

27 30. DEFENDANTS' ACTS, AS ALLEGED HEREIN, WERE DESPICABLE, KNOWING, WILLFUL,
 28 MALICIOUS, AND/OR CARRIED OUT WITH RECKLESS DISREGARD FOR MARVIN MCELROYS

1 36. SPECIFICALLY, DEFENDANTS KNOWINGLY, MALICIOUSLY AND SADISTICALLY
 2 INFILTED PHYSICAL, EMOTIONAL, AND MENTAL ABUSE UPON MARVIN McELROY WHEN
 3 THEY PAINFULLY DRAGGED HIM ACROSS FA3 PLAZA BY HIS BROKEN WRIST IN HAND-
 4 CUFFS. DEFENDANTS' ACTIONS OFFEND CONTEMPORY STANDARDS OF DECENCY.

5 37. PLAINTIFF IS INFORMED AND BELIEVES, AND THEREON ALLEGES, THAT
 6 DEFENDANT(S) CAPTAIN D. ARLINE, LT. BOSTON, ~~AND~~ SGT G. SIMON, KNEW THAT
 7 DEFENDANT(S) NERI AND JACKSON WAS/IS CAPABLE OF, AND LIKELY TO PERPETRATE
 8 SUCH AN OSTRAGEOUS ACT AS DRAGGING MARVIN BY HIS BROKEN WRIST IN HAND-
 9 CUFFS ACROSS FA3 PLAZA. PLAINTIFF IS FURTHER INFORMED AND BELIEVES, AND
 10 THEREON ALLEGES, THAT DEFENDANT [C]APTAIN D. ARLINE KNEW THAT SUCH CONDUCT
 11 WOULD BE HARMFUL TO MR McELROY OR ANY OTHER INMATE SUBJECTED TO SUCH
 12 CONDUCT, YET ALLOWED DEFENDANT(S) NERI AND JACKSON TO REMAIN IN ~~THEIR~~ POSITION
 13 OF AUTHORITY, AND TO CARRY OUT THE OFFENSIVE BEHAVIOR. IN DOING SO DEFENDANT
 14 CAPTAIN D. ARLINE IMPLEMENTED A POLICY THAT REPUDIATED MARVIN McELROY
 15 CONSTITUTIONAL RIGHTS AND WAS UNCONSCIONABLE. UNDER THE DOCTRINE OF
 16 SUPERVISORY LIABILITY DEFENDANT CAPTAIN D. ARLINE IS LIABLE FOR MARVIN McELROY'S
 17 INJURIES.

18 **(3) VIOLATION OF PRISONER'S EIGHTH AMENDMENT RIGHT TO BE
 19 FREE FROM THE USE OF EXCESSIVE FORCE**

20 38. PLAINTIFF REALLEGES AND INCORPORATES BY REFERENCE EACH OF THE
 21 GENERAL ALLEGATIONS OF PARAGRAPHS 1 THROUGH 23, INCLUSIVE, AND PARAGRAPHS 28
 22 THROUGH 33, INCLUSIVE, OF THE FIRST CLAIM, AS IF ALLEGED HEREIN.

23 39. DEFENDANT(S) NERI AND JACKSON VIOLATED MARVIN McELROY'S EIGHTH
 24 AMENDMENT RIGHT TO BE PROTECTED FROM CRUEL AND UNUSUAL PUNISHMENT IN
 25 THE FORM OF EXCESSIVE FORCE, BY THEIR UNNECESSARY AND WANTON INFILCTION OF
 26 PAIN, INCLUDING PHYSICAL INJURY AND PSYCHOLOGICAL AND EMOTIONAL DISTRESS, AS
 27 HEREIN ALLEGED

28 40. SPECIFICALLY, DEFENDANTS KNOWINGLY, MALICIOUSLY AND SADISTICALLY INFILTED

1 PHYSICAL, EMOTIONAL, AND MENTAL ABUSE UPON MR M'ELROY WHEN THEY TACKLED HIM IN
 2 THE MEDICAL BUILDING AND PUSHED THE, ONCE EXPOSED, PINS, HOLDING HIS ~~WRIST~~ BROKEN
 3 WRIST TOGETHER, ALL THE WAY INTO THE BONE BENEATH THE SKIN. DEFENDENTS'
 4 ACTIONS OFFEND CONTEMPORARY STANDARDS OF DECENCY.

5 PLAINTIFF IS INFORMED AND BELIEVES, AND THEREON ALLEGES, THAT DEFENDANT
 6 SIMON KNEW THAT DEFENDENTS NERI AND JACKSON WAS CAPABLE OF, AND LIKELY TO
 7 PERPETRATE SUCH AN ODTRAGEDDS ACT AS JUMPING ON/TACKLING A BLIND AND CRIPPLE
 8 MARVIN M'ELRDY. PLAINTIFF IS FURTHER INFORMED AND BELIEVES, AND THEREON ALLEGES,
 9 THAT DEFENDANT SIMON KNEW THAT SUCH CONDUCT WOULD BE HARMFUL TO MARVIN OR
 10 ANY OTHER INMATE SUBJECTED TO SUCH CONDUCT, YET ALLOWED DEFENDENTS NERI
 11 JACKSON TO REMAIN IN THEIR POSITION OF AUTHORITY, AND TO CARRY OUT OFFENSIVE
 12 BEHAVIOR. IN DOING SO, DEFENDANT SIMON IMPLEMENTED A POLICY THAT REPROVATED MARVIN'S
 13 CONSTITUTIONAL RIGHTS AND WAS UNCONSCIONABLE. UNDER THE DOCTRINE OF SUPERVISORY
 14 LIABILITY DEFENDANT SIMON IS LIABLE FOR MARVIN'S INJURIES.

④ VIOLATION OF PRISONER'S EIGHTH AMENDMENT RIGHT TO BE PROTECTED FROM VIOLENCE BY OTHER PRISONERS

15 PLAINTIFF REALLEGES AND INCORPORATES BY REFERENCE EACH OF THE GENERAL
 16 ALLEGATIONS OF PARAGRAPHS 1 THROUGH 23, INCLUSIVE, AND PARAGRAPHS 28 THROUGH 33,
 17 INCLUSIVE, OF THE FIRST CLAIM, AS IF ALLEGED HEREIN.

18 DEFENDANTS HARRIS AND ROCHA VIOLATED MARVIN M'ELROY'S EIGHTH AMENDMENT
 19 RIGHT TO BE PROTECTED FROM VIOLENCE BY OTHER PRISONERS, BY FAILING TO
 20 RESPOND WHEN MARVIN WAS UNDER ATTACK THEY WERE/ARE DELIBERATELY
 21 INDIFFERENT TO MARVIN'S RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT
 22 AND HAS RESULTED IN SIGNIFICANT IRREPAIRABLE INJURY. SAID INJURY HAS INCLUDED,
 23 BUT NOT NECESSARILY BEEN LIMITED TO, A SECOND SURGERY, MULTIPLE TRIPS TO HOSPITAL
 24 TO HAVE CAST REPLACED BECAUSE OF CONTINUED SWELLING, PERMANENT LOSS OF RANGE
 25 OF MOTION/UNABLE TO BEND HAND BACK, AND VERY SEVERE PAIN. PLAINTIFF'S
 26 MEDICAL CONDITION ALSO SIGNIFICANTLY AFFECTS ACTIVITIES IN PRISON EACH/EVERY DAY.

1 44. PLAINTIFF IS INFORMED AND BELIEVES, AND THEREON ALLEGES, THAT DEFENDANTS
 2 HARRIS AND ROCHA ACTED INTENTIONALLY IN THE MANNER DESCRIBED ABOVE WITH
 3 KNOWLEDGE OF SUFFERING, BY THE PLAINTIFF, AND OF THE RISK OF FURTHER SERIOUS
 4 INJURY AND HARM THAT RESULTED FROM THEIR ACTION OF REFUSING TO ACT.

5 45. AS A PROXIMATE RESULT OF DEFENDANT(S) HARRIS AND ROCHA'S CONDUCT, MARVIN
 6 HAS SUFFERED AND CONTINUES TO SUFFER GENERAL DAMAGES IN THE FORM OF
 7 SEVERE PAIN AND SUFFERING AND EMOTIONAL, MENTAL AND PSYCHOLOGICAL DISTRESS.
 8 PLAINTIFF IS INFORMED AND BELIEVES, AND THEREON ALLEGES, THAT HE WILL CONTINUE TO
 9 SUFFER SUCH DAMAGES IN THE FUTURE.

10 (5) VIOLATION OF PRISONER'S EIGHTH AMENDMENT RIGHT TO
 11 PERSONAL SAFETY

12 46. PLAINTIFF REALLEGES AND INCORPORATES BY REFERENCE EACH OF THE
 13 GENERAL ALLEGATIONS OF PARAGRAPHS 1 THROUGH 45, INCLUSIVE, AS IF ALLEGED HEREIN.

14 47. DEFENDANT(S) HAVE DENIED MARVIN McELROY HIS EIGHTH AMENDMENT RIGHT TO BE
 15 FREE FROM CRUEL AND UNUSUAL PUNISHMENT IN THE FORM OF DEPRIVATION OF PERSONAL
 16 SAFETY, THIS DENYING A BASIC HUMAN NEED GUARANTEED TO PRISONERS BY THE
 17 UNITED STATES CONSTITUTION.

18 48. IN DOING SO AS ALLEGED HEREINAFORE, DEFENDANT(S) ACTED WITH DELIBERATE
 19 INDIFFERENCE TO MARVIN'S PERSONAL SAFETY, AND SUBJECTED HIM TO UNNECESSARY
 20 AND WANTON INFILCTION OF PAIN, INCLUDING PHYSICAL INJURY AND PSYCHOLOGICAL AND
 21 EMOTIONAL DISTRESS, IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AMENDMENT.
 22 SPECIFICALLY, DEFENDANT(S) WERE DELIBERATELY INDIFFERENT TO MARVIN McELROY'S RIGHT
 23 TO HAVE PERSONAL SAFETY WHEN THEY INTENTIONALLY, KNOWINGLY, AND MALICIOUSLY
 24 INFILCTED PHYSICAL ABUSE AND HUMILIATION ON MARVIN BY GRABBING AND JERKING HIS
 25 BROKEN ARM/WRIST, PEPPER SPRAYING HIM, DRAGGING HIM ACROSS FA3 PLAZA BY HIS BROKE
 26 WRIST IN HANDCUFFS, TACKLING HIM, WATCHING^{HIM} BEING ASSAULTED BY [TWO] INMATES WHO
 27 BROKE MARVIN'S WRIST THAT DEFENDANT(S) HARRIS AND ROCHA LET GET AWAY, AND BY ASP
 28 OFFICIAL KNOWINGLY ~~HOUSED~~ HOUSED MR McELROY UNDER CONDITIONS THAT, FOR HIM,

1 IMPOSE AN ATYPICAL AND SIGNIFICANT HARDSHIP IN RELATION TO THE ORDINARY
2 INCIDENTS OF PRISON LIFE, AND IS ALSO A VIOLATION OF HIS RIGHTS TO DUE PROCESS
3 UNDER THE FOURTEENTH AMENDMENT~~S~~ OF THE UNITED STATES CONSTITUTION.

4 49. DEFENDENT(S) ACTED DESPICABLY, KNOWINGLY, WILLFULLY, AND MALICIOUSLY, OR
5 WITH RECKLESS OR CALLOUS DISREGARD FOR MR M'ELROY'S FEDERALLY PROTECTED RIGHTS.

6 50. AS A DIRECT AND PROXIMATE RESULT OF ALL OF THE DEFENDENT(S)' ACTIONS
7 HEREIN ALLEGED, MARVIN SUFFERED, AND CONTINUES TO SUFFER, PHYSICAL INJURY. MR M'ELROY
8 IS ENTITLED TO AN AWARD OF COMPENSATORY AND ~~PUNITIVE~~ PUNITIVE DAMAGES FOR
9 INJURIES SUFFERED.

10 51. AS A DIRECT AND PROXIMATE RESULT OF THE DEFENDENT(S)' ACTIONS HEREIN
11 ALLEGED, MARVIN SUFFERED, AND CONTINUES TO SUFFER, SEVERE EMOTIONAL AND PSYCHOLOGICAL
12 DISTRESS. MR M'ELROY IS ENTITLED TO AN AWARD OF COMPENSATORY AND PUNITIVE DAMAGES
13 FOR INJURIES SUFFERED.

14 52. MARVIN M'ELROY IS ENTITLED TO INJUNCTIVE RELIEF, INCLUDING, BUT NOT LIMITED
15 TO, AN ORDER REQUIRING HIS TRANSFER AWAY FROM ASP, WHERE HE WILL NOT BE
16 SUBJECT TO RETALIATION INSTIGATED/RATIFIED BY ANY OF THE DEFENDENT(S) THERE
17 IS NO ADEQUATE REMEDY AT LAW TO PROTECT MARVIN FROM SAID RETALIATION, AND
18 WITHOUT THE EQUITABLE RELIEF SOUGHT HE IS SUSCEPTIBLE TO GREAT IRREPARABLE
19 INJURY. THE HARM TO THE DEFENDENT(S) SHOULD MR M'ELROY BE TRANSFERRED AWAY
20 FROM ASP, IS LITTLE OR NO PREJUDICE, BUT GREAT HARM TO MARVIN SHOULD HE BE
21 REQUIRED TO STAY AT THAT INSTITUTION.

22 **(6) VIOLATION OF PRISONER'S FOURTEENTH AMENDMENT
23 RIGHT TO PROCEDURAL DUE PROCESS**

24 53. PLAINTIFF REALLEGES AND INCORPORATES BY REFERENCE EACH ALLEGATION OF
25 PARAGRAPHS 1 THROUGH 52, INCLUSIVE, AS IF ALLEGED HEREIN.

26 54. DEFENDANT(S)/PRISON OFFICIALS HAVE DENIED MARVIN M'ELROY HIS 14 AMEND.
27 RIGHTS, BY DEPRIVING PLAINTIFF OF HIS LIBERTY INTEREST WITHOUT DUE PROCESS.

28 55. IN DOING SO, AS ALLEGED HEREIN ABOVE, DEFENDANT(S) HAVE KNOWINGLY CAUSED

1 MARVIN PAIN, AS A RESULT OF DEFENDANT(S), DELIBERATE INDIFFERENCE FOR MR M'ELROYS
 2 8TH AMEND. RIGHT TO BE FREE FROM CRUEL AND DUSUAL PUNISHMENT, MARVIN HAS
 3 SUFFERED AND CONTINUES SOFFER IRREPARABLE INJURY AND EMOTIONAL, MENTAL AND
 4 PSYCHOLOGICAL DISTRESS, AS A DIRECT/INDIRECT RESULT OF THE DEFENDANT(S)
 5 ACTIONS OR FAILURE TO ACT, HAVE THUSFAR CAUSED MARVIN TO SOFFER AN "
 6 ATYPICAL AND SIGNIFICANT HARSHSHIP IN RELATION TO THE ORDINARY INCIDENTS
 7 OF PRISON LIFE".

8 56. PLAINTIFF, HEREBY REALLEGES AND INCORPORATES BY REFERENCE EACH
 9 ALLEGATION OF PARAGRAPHS 49 THROOCH 52, INCLUSIVE, AS IF ALLEGED HEREIN.

10 B. STATE CLAIMS FOR RELIEF(/ CAL TORT CLAIMS)

11 ① DEFENDANT(S)/OTHER PRISON OFFICIALS' WRONGFUL AND
 12 NEGIGENT ACTS AND OMISSIONS HAVE CAUSED PLAINTIFF
 13 IRREPARABLE HARM AND INJORY

14 57. PLAINTIFF REALLEGES AND INCORPORATES BY REFERENCE EACH ALLEGATION
 15 IN A GENERAL WAY OF PARAGRAPHS 1 THROUGH 23, INCLUSIVE, AS IF ALLEGED HEREIN.

16 58. PLAINTIFF HAS FILED A COMPLAINT WITH THE BOARD OF CONTROL THAT WAS
 17 REJECTED; THAT ADDRESSED THE ISSUES RAISED HEREIN THIS COMPLAINT,

18 58. AS A RESULT OF THE DEFENDANT(S) WRONGFULLY NEGIGENT ACTS AND
 19 OMISSIONS MARVIN M'ELROY HAS SUFFERED AND CONTINUES TO SUFFER IRREPARABLE
 20 INJORY.

21 59. PLAINTIFF REALLEGES AND INCORNDATES BY REFERENCE EACH ALLEGATION OF
 22 PARAGRAPHS 49 THROOCH 52, INCLUSIVE, AS IF ALLEGED HEREIN.

23 VII PLEADING REQUIREMENTS (F.R.CIV.P. 26)

24 60. ALL OF THE ABOVE STATED FACTS/CLAIMS, HAVE BEEN "PLED"
 25 WITH "PARTICULARITY" AS REQUIRED" BY RULE 26.

26 VIII PRAYER FOR RELIEF

27 WHEREFORE, PLAINTIFF, MARVIN M'ELROY PRAYS FOR JUDGEMENT
 28 AGAINST DEFENDANTS AS FOLLOWS:

I. DECLARATORY RELIEF; DECLARE EACH PARTYS' RIGHTS AND LIABILITIES;

2. INJUNCTIVE RELIEF; IN THE FORM PROPER CLASSIFICATION /
HOUSING PLACEMENT THAT FACTORS IN AND CONSIDERS PLAINTIFFS
HEALTH / IMPAIRED MOBILITY / PSYCHIATRIC CONDITION AND 'SAFETY' CONCERNs;

3. COMPENSATORY DAMAGES; OF \$120,000~~00~~ FOR:

c. \$ 20,000⁰⁰ FOR IRREPARABLE HARM/INJURY SUFFERED AS
RESULT OF DEFENDANTS ACTION/INACTION A DESCRIBED ABOVE.

b. \$10,000~~RE~~ FOR EACH DEFENDANT NAMED HEREIN ABOVE;

4. PUNITIVE DAMAGES, OF \$1,000,000⁰⁰ FOR THE MALICIOUS AND SADISTIC ACT PLAINTIFF WAS SUBJECTED TO BY SAID DEFENDANTS;

5. NOMINAL DAMAGES AS DECIDED AT TRIAL;

6. REASONABLE ATTORNEY'S FEES PURSUANT TO 42 USC § 1988;

7. COST OF SUIT; AND

8. SUCH FURTHER RELIEF THIS COURT DEEMS PROPER.

DEMAND FOR JURY TRIAL

PLAINTIFF, MARVIN MCELROY HEREBY DEMANDS A TRIAL BY JURY.

DATED: MARCH 29, 2008

RESPECTFULLY SUBMITTED

BY: Marvin McElroy
MARVIN M^CELROY

~~VIX~~ VERIFICATION

J. MARVIN M'ELROY, STATE:

I AM THE PLAINTIFF IN THE CIVIL COMPLAINT. I HAVE READ THE FOREGOING
COMPLAINT AND THE FACTS STATED THEREIN ARE THOSE OF MY OWN KNOWLEDGE, EXCEPT
AS TO MATTERS THAT ARE THEREIN STATED UPON INFORMATION AND BELIEF, AND AS TO
THOSE MATTERS I BELIEVE THEM TO BE TRUE.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.
EXECUTED AT AVENTA AT KINGS COUNTY AT CALIFORNIA ON MAY 29 2008.

Marvin McElroy
MARVIN MCELROY

1 MARVIN McELROY, C73864
2 AVENAL SP
3 PO BOX 8
4 AVENAL, CA 93204

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6
7
8 UNITED STATES DISTRICT COURT
9 FOR THE
10 NORTHERN DISTRICT OF CALIFORNIA

11
12
13 MARVIN McELROY,
Plaintiff,

14 v.
15 CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
16 DIRECTOR OF CORRECTIONS, W.D. GAUSEWITZ, et al.,
AVENAL STATE PRISON, et al.,
17 JAMES D. HARTLEY, WARDEN,
Defendant(s)

ORDER TO SHOW CAUSE FOR A
PRELIMINARY INJUNCTION AND A
TEMPORARY RESTRAINING ORDER
AND MEMORANDUM OF LAW AND
DECLARATIONS SUBMITTED HEREWITH
IN SUPPORT OF
CIVIL ACTION NO. _____

UPON THE COMPLAINT, THE SUPPORTING DECLARATIONS OF PLAINTIFF, AND THE
MEMORANDUM OF LAW SUBMITTED HEREWITH, IT IS:

ORDERED THAT DEFENDANTS WILLIAM GAUSEWITZ, DIRECTOR OF CORRECTIONS
AND JAMES D. HARTLEY, WARDEN OF AVENAL STATE PRISON SHOW CAUSE IN
ROOM _____ OF THE UNITED STATES COURTHOUSE AT _____
ON THE _____ DAY OF _____, 2008, AT _____
O'CLOCK, WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE PURSUANT TO
RULE 65(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE ENJOINING THE

DEFENDANTS, THEIR SUCCESSOR IN OFFICE, AGENTS AND EMPLOYEES AND ALL OTHER PERSONS ACTING IN CONCERT AND PARTICIPATION WITH, FROM / TO :

1. TRANSFER PLAINTIFF AWAY FROM ASP, TO A NONDORMITORY INSTITUTION;
2. CALL TO HEARING/REVIEW PLAINTIFF'S CURRENT CLASSIFICATION SCORE AND JUST HIS HOUSING PLACEMENT TO MEET THE LEVEL OF SECURITY REQUIRED TO MAINTAIN HIS HEALTH AND SAFETY.
3. REVIEW ALL PERTINENT DOCUMENTS / FILES NECESSARY TO THE SAFE KEEPING AND WELLBEING OF PLAINTIFF, AND ANY OTHER DECISIONS AFFECTING HIS WELFARE/HOUSING PLACEMENT

IT IS FURTHER ORDERED THAT EFFECTIVE IMMEDIATELY, AND PENDING THE HEARING AND DETERMINATION OF THIS ORDER TO SHOW CAUSE, THE DEFENDANTS W. GLASGOW AND J.D. HARTLEY AND EACH OF THEIR OFFICERS, AGENTS, EMPLOYEES, AND ALL PERSONS ACTING IN CONCERT OR PARTICIPATION WITH THEM, ARE RESTRAINED FROM:

4. PHYSICALLY ABUSING PLAINTIFF/ USING EXCESSIVE FORCE;
5. ANY FURTHER VERBAL/MENTAL/EMOTIONAL/PSYCHOLOGICAL ABUSE;
6. ARBITRARY,CAPRICIOUS/ANY IRRATIONAL CLASSIFICATION OF PLAINTIFF;
7. HOUSING PLAINTIFF IN GYMS / DORMITORY HOUSING UNITS;
8. DEPRIVING PLAINTIFF WITH PERSONS DEFINED UNDER 15 CCR § 3141; AND
9. ANY OTHER ACTION THAT MAY OBSTRUCT PLAINTIFF'S ACCESS TO THE COURTS INCLUDING THE ERRONIOUS SCREEN OUTS OF GRIEVANCES, THAT SUBSEQUENTLY HAS EFFECT/AFFECT OF PREVENTING INMATES FROM EXHAUSTING ADMINISTRATIVE REMEDIES.

IT IS FURTHER ORDERED THAT THE ORDER TO SHOW CAUSE, AND ALL OTHER PAPERS ATTACHED TO THIS APPLICATION BE SERVED ON THE FORESAID PLAINTIFF BY JUNE 27, 2008.

DATED: _____
UNITED STATES DISTRICT JUDGE

1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ORDER
 2 TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND FOR A
 3 TEMPORARY RESTRAINING ORDER.

4 I. PRISON OFFICIALS VIOLATED THE 8TH AMENDMENT BY
 5 DEPRIVING PLAINTIFF OF HIS RIGHT TO PERSONAL SAFETY
 6 AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT

7 I. IN EVALUATING A CLAIM OF CRUEL AND USUAL PUNISHMENT, A COURT FIRST
 8 ASK WHETHER THE DEPRIVATION WAS SUFFICIENTLY SERIOUS. WILSON V. SEITER
 9 (1991) 501 U.S. 294 [111 S.C.T. 2321; 115 L.ED. 2D 271]. THIS OBJECTIVE COMPONENT

10 REQUIRES A DEPRIVATION OF "THE MINIMAL CIVILIZED MEASURES OF LIFE'S NECESSITIES."
 11 HUDSON V. McMILLAN (1992) 503 U.S. 197 [112 S.C.T. 995; 117 L.ED. 2D 156] (CITING
 12 RHODES V. CHAPMAN (1981) 452 U.S. 337, 347 [101 S.C.T. 2392; 69 L.ED. 2D 59]).

13 2. PERSONAL SAFETY IS ONE OF LIFE'S NECESSITIES. HOPTOWIT V. PAY (9TH CIR. 1982)
 14 682 F.2D 1237, 1246. WHETHER A CONDITION OR INJURY VIOLATES CONTEMPORARY
 15 STANDARDS OF DECENCY WILL VARY FROM SITUATION TO SITUATION. A TRANSFER MIGHT
 16 SUBJECT A PRISONER TO CRUEL AND UNUSUAL PUNISHMENT IF THE PRISONER WOULD
 17 BE PLACED WITH KNOWN ENEMIES [OR OTHERS WHO WOULD CAUSE SERIOUS HARM. SEE
 18 FARMER V. BRENNAN (1944) 511 U.S. 825 [114 S.C.T. 1970; 128 L.ED. 2D 811] (PRISON OFFICIALS
 19 HAVE DUTY TO PROTECT PRISONERS FROM VIOLENCE AT THE HANDS OF OTHER PRISONERS
 20 ; A CONSTITUTIONAL VIOLATION OCCURS WHEN THE DANGER OF HARM IS "SUFFICIENTLY
 21 SERIOUS" AND THE PRISON OFFICIALS ACT WITH "DELIBERATE INDIFFERENCE" TO
 22 INMATE'S HEALTH OR SAFETY).

23 3. THE PLAINTIFF HAS BEEN PLACED WITH THOSE WHO CAUSED HIM SERIOUS HARM (SEE
 24 EXHIBIT 'H') IN DOING SO PRISON OFFICIALS HAVE NEGLECTED TO PERFORM THEIR DUTY AND
 25 PROTECT THE PLAINTIFF AND ARE DELIBERATELY INDIFFERENT TO THE FUTURE RISK
 26 OF FUTURE HARM THE PLAINTIFF IS FACING. WHILE, THE PLAINTIFF HAS RAISED HIS
 27 CONCERNs, PRISON OFFICIALS HAVE FAILED TO PROTECT HIM, EVEN THOUGH THEY HAVE
 28 HAD, AND CONTINUE TO HAVE THE ABILITY TO DO SO. IN THE PLAINTIFF'S RECENTLY FILED
 ADMINISTRATIVE APPEAL RAISING "LIFE AND SAFETY CONCERNs" (SEE EXHIBIT 'P')

1 ASP-M-08-01308, denied, SGT PHILAN STATED at [APPEAL RESPONSE] "... IF YOU HAD BEEN ABLE
 2 TO IDENTIFY THESE INMATES AT THE TIME OF THIS ALLEGED INCIDENT APPROPRIATE
 3 STEPS WOULD BE IN PLACE SO AS NOT JEOPARDIZE YOUR SAFETY...").

4 IT'S NOT THE PLAINTIFFS JOB TO PROTECT HIMSELF NOR ANY ONE ELSE/INMATES.
 5 PLAINTIFF, 59 WEARS GLASSES, ALLEGES THAT HE TRIED TO IDENTIFY HIS ATTACKERS,
 6 WHO ATTACKED HIM WITHOUT WARNING, BUT COULD NOT; THOUGH DID IDENTIFY RAYMOND
 7 MARTINEZ (SEE M'ELROY DECLARATION #2 at [PARAGRAPH 2]) WHO HAD PREVIOUSLY TRIED TO
 8 ECSTASY COLOR PENCILS FROM PLAINTIFF (MARTINEZ KNOWS ABOUT PLAINTIFF'S LETTER
 9 OF COMMENDATION FOR HELPING A "COP"); THEY LIVED IN THE SAME HOUSING UNIT.
 10 PLAINTIFF ALSO ALLEGES HE WAS DENIED A CHANCE TO IDENTIFY (BY PHOTOLINEUP) THE
 11 WITNESSES, WHO WERE TAKEN ~~TO CUSTODY~~ INTO CUSTODY AT THE TIME OF THE
 12 INCIDENT, NOR WAS HE PERMITTED TO CALL FORTH ALL THOSE INMATES (SEE EXHIBIT 'P'
 13 at [PG 15] RVR# F4-08-01-044) WHO WERE IN THE AREA OF THE INCIDENT, TO HELP
 14 IDENTIFY HIS ATTACKERS. FURTHERMORE ALL OF PLAINTIFF'S ENEMY CONCERN(S), HAVE
 15 BEEN/ARE BECAUSE PLAINTIFF IN 1993 "RESCUED" A CORRECTIONAL OFFICER WHO WAS
 16 BEING VIOLENTLY ATTACKED BY ANOTHER INMATE, INMATES WHO PROBABLY/TAKE HIS
 17 LIFE IF THEY FOUND OUT, THAT PLAINTIFF ALSO "SNITCHED" (/RAT); CONSIDERING
 18 THE DEFENDANTS/OTHER PRISON OFFICIALS FAILURE TO RESPOND REASONABLE TO
 19 THE PLAINTIFF'S SAFETY AND ENEMY CONCERN(S).

20 4. A CONDITION WHICH HAS NOT CAUSED ANY PRESENT INJURY MAY STILL VIOLATE THE
 21 8TH AMENDMENT IF IT THERE IS "IMMINENT DANGER," AND THE CONDITION IS VERY LIKELY
 22 TO CAUSE "SERIOUS ILLNESS AND NEEDLESS SUFFERING." HELLING V. MCKINNEY (1993) 529
 23 U.S. 25 [113 S.CT. 2475; 125 L.ED. 2D 28] (INMATE EXPOSURE TO CIGARETE SMOKING); WALLIS V.
 24 BALDWIN (9TH CIR. 1995) 72 F.3D 1074 (REQUIRING INMATES TO CLEAN ATTIC WHEN JAILERS
 25 KNEW OR SUSPECTED PRESENCE OF ASBESTOS COULD VIOLATE 8TH AMENDMENT).

26 THE PLAINTIFF HAS DEMONSTRATED HE IS IN "IMMINENT DANGER" AND THAT HE HAS
 27 NEEDLESSLY SUFFERED) AND HE CONTINUES TO SUFFER PAIN CAUSED THE ATTACKS OF INMATES
 28 AND FROM THE ABUSE/USE OF EXCESSIVE FORCE BY THE DEFENDANTS AND FROM THE

1 DEFENDANTS NEGLECTING TO PROPERLY TRAIN THEIR STAFF. PLAINTIFF IS ALSO
 2 SUFFERING SERIOUS ILLNESS, POST TRAUMATIC STRESS DISORDER, AS A RESULT OF THE
 3 DEFENDANTS' AND PRISON OFFICIALS' ACTIONS/Failure TO ACT/REASONABLY RESPOND TO
 4 PLAINTIFF'S SAFETY CONCERNs AND NEEDS.

5. IN DETERMINING WHETHER A PARTICULAR CONDITION IS CONTRARY TO CIVILIZED
 6 STANDARDS OF DECENCY, COURTS CAN CONSIDER THE OPINIONS OF EXPERTS, BUT SUCH OPINIONS
 7 WILL NOT ORDINARILY ESTABLISH CONSTITUTIONAL STANDARDS. ACCORDING TO THE NINTH
 8 CIRCUIT COURTS OF APPEALS, WHAT THE GENERAL PUBLIC WOULD THINK ABOUT A
 9 PARTICULAR CONDITION IS MORE IMPORTANT THAN EXPERT OPINION. HOPEWIT v. RAY (9TH
 10 CIR. 1982) 682 F.2D 1237; SEE ALSO KEENAN V. HALL (9TH CIR. 1996) 83 F.3D 1083 (DISCUSSING
 11 NUMEROUS CONDITIONS ISSUES THAT CAN RAISE EIGHTH AMENDMENT CONCERNs).

12. THE SECOND COMPONENT REQUIRES A CONSIDERATION OF PRISON OFFICIALS STATE OF
 13 MIND IN RELATION TO THE SITUATION BEING ADDRESSED, IS PRISON OFFICIALS CONDUCT WANTON?
 14 STANDARD IS WHETHER AN OFFICIAL ACTED WANTONLY DEPENDS ON THE NATURE OF THE
 15 PRISONER'S CLAIM. "WANTON" IN GENERAL PRISON CONDITIONS CASES MEANS ACTING WITH "
 16 DELIBERATE INDIFFERENCE." A PRISON OFFICIAL ACTS WITH DELIBERATE INDIFFERENCE IF HE
 17 OR SHE KNOWS OF AND DISREGARDS AN INHUMANE CONDITION OR ACTION THAT CONSTITUTES AN
 18 EXCESSIVE RISK TO INMATE HEALTH AND SAFETY.

19 THE FINAL POLICY MAKER(s) HAS READ/REVIEWED THE PLAINTIFF'S CENTRAL FILE, AND
 20 IS AWARE OF THE EXCESSIVE RISK TO PLAINTIFF, AND THE NAMED SUPERVISORY OFFICIALS/OTHER
 21 PRISON OFFICIALS AND PERSONNEL OBSERVED THE HARMFUL CONDUCT/EXCESSIVE USE OF
 22 FORCE, ATTACKS FROM OTHER INMATES AND FAILED TO PROTECT PLAINTIFF, AND ARE AWARE OF
 23 THE PLAINTIFF'S FRAGILE PSYCHOLOGICAL WELLBEING/HEALTH WHICH IS DIRECTLY AFFECTED
 24 BY THE CONDITIONS OF HIS CONFINEMENT.

25. IN THIS REGARD, A PRISON OFFICIAL"WOULD NOT ESCAPE LIABILITY IF THE EVIDENCE SHOWED THAT
 26 HE MERELY REFUSED TO VERIFY UNDERLYING FACTS THAT HE STRONGLY SUSPECTED TO BE TRUE,
 27 DECLINED TO CONFIRM INFERENCES OF RISK THAT HE STRONGLY SUSPECTED TO EXIST." FARMER V.
 28 BRENNAN (1994) 511 U.S. 825, 842-843 [114 S.CT. 1970; 128 L.ED. 2D 817]; SEE ALSO ID. AT FN.8.

1 II PRISON OFFICIALS/OFFICERS FAILURE TO REASONABLY
 2 RESPOND TO, AND PROTECT PLAINTIFF FROM ASSAULT BY
 3 OTHER INMATES, VIOLATED PLAINTIFF'S 8TH AMENDMENT
 4 RIGHT, UNDER THE FEDERAL CONSTITUTION, TO BE ~~FREE~~
 5 FROM CRUEL AND UNUSUAL PUNISHMENT

6 8. PRISONERS HAVE A RIGHT UNDER THE 8TH AMENDMENT OF THE FEDERAL
 7 CONSTITUTION TO BE REASONABLY PROTECTED FROM CONSTANT THREAT OF
 8 VIOLENCE AND SEXUAL ASSAULT BY FELLOW PRISONERS, AND HE/SHE NEED NOT
 9 WAIT UNTIL AN ASSAULT OCCURS TO OBTAIN RELIEF. FARMER V. BRENNAN
 10 (1994) 511 U.S. 825 [114 S.CT 1970; 128 L.ED. 2D 811]; NDLL V. CARLSON (9TH CIR. 1987)
 11 809 F. 2D 1446; see also BERGV. KINCHELO (9TH CIR. 1986) 794 F. 2D 457, 459 (CLAIM
 12 BASED ON THREAT OF SUFFICIENT).

13 THE PLAINTIFF HAS A WELL DOCUMENTED HISTORY OF ENEMY CONCERNS,
 14 DATEING BACK TO 1993 (see EXHIBITS 'Iii' AND 'Oii'). THE PLAINTIFF'S MOST
 15 RECENT ATTACK, SUFFERED, ALSO, DEMONSTRATES THAT, THIS SELFLESS ACT,
 16 OF SAVING LT. GIDOTTININI JULY 6, 1993, IS STILL CONSTRUED BY THE GENERAL
 17 PRISON POPULATION, EVEN ON 'SNY' YARDS, TO BE AN ~~UNFORGIVABLE~~ GESTURE/
 18 ACT. THE ATTACK[S], HE HAS THUSFAR SUFFERED, BECAUSE OF SAID ACT, HAVE
 19 LEFT HIM WITH [T]WO ~~IRREPARABLE~~ INJURIES. HE WILL NEVER BE ABLE TO
 20 RUN AGAIN AND THE LOSS OF MOBILITY/ABILITY TO USE HIS RIGHT HAND/
 21 WRIST/ARM, GREATLY REDUCES HIS QDAUTY OF LIFE AND, IMPAIRS HIS ABILITY
 22 TO PERFORM LIFE'S MEST BASIC FUNCTIONS; LIKE TYEING HIS SHOES OR
 23 SIGNING HIS NAME.

24 HE HAS SUFFERED FAR MORE THAN A SIMPLE THREAT; HOWEVER THE NEXT
 25 INCIDENT WILL PROBL~~E~~ TAKE HIS LIFE.

26 9. WHILE MERE NEGLIGENCE ON THE PART OF PRISON OFFICIALS IS
 27 INSUFFICIENT TO SUPPORT A CONSTITUTIONAL CLAIM; THEIR ACTIONS IN
 28 FAILING TO PROTECT A PRISONER MUST AMOUNT TO DELIBERATE INDIFERENCE
 29 TO THE [P]RISONERS NEED. DAVID V. CANNON (1986) 474 U.S. 344 [106 S.CT. 628],

1 88 L.ED. 2D 677]; FARMER V. BRENNAN (1994) 511 U.S. 825 [114 S.CT. 1970; 128 L.ED. 2D 810];
 2 BERG V. KINCHELDE (9TH CIR. 1998) 794 F.2D 457; HARRIS V. ROBERTS (N.D.CAL. 1989) 719
 3 F. SUPP. 879; LEER V. MURPHY (9TH CIR. 1988) 844 F.2D 628, 633; REDMAN V. COUNTY OF
 4 SAN DIEGO (9TH CIR. 1991) 942 F.2D 1438.

5 PRIOR TO THE ATTACK, PLAINTIFF SUFFERED IN 2002, HE HAD GONE TO PRISON
 6 OFFICIALS AND INFORMED THEM THAT HIS CELLIE DID NOT WANT HIM AS A CELLY;
 7 BECAUSE OF THEIR FAILURE TO RESPOND REASONABLY, TO HIS GRIEVANCE/COMPLAINT,
 8 HIS NOW UNABLE TO RUN; JUST LIKE TODAY, THE DEFENDANTS JUST STOOD THERE
 9 WITH CALIDUS INDIFFERENCE WATCHING A 59 YEAR OLD, ELDERLY MAN, BEING BRUTILY
 10 ATTACKED AND BEATEN BY TWO INMATES WHO BROKE HIS WRIST AND GOT AWAY.

11 IT'S THIS VERY SYSTEMIC PATTERN OF FAILING TO REASONABLY RESPOND TO
 12 VOICED CONCERN'S/VISIBLY APPARENT SITUATIONS/CIRCUMSTANCES/INCIDENTS THAT
 13 HAS CHANGED THE PLAINTIFF'S LIFE; AS HE ONCE KNEW IT.

14 10. PRISON OFFICIAL'S KNOWLEDGE OF SUBSTANTIAL RISK TO INMATES SAFETY, FOR
 15 PURPOSE OF INMATES CLAIM THAT OFFICIAL VIOLATED 8TH AMENDMENT BY FAILING TO
 16 PROTECT
 17 INMATE, IS QUESTION OF FACT AND CAN BE PROVEN BY CIRCUMSTANTIAL EVIDENCE; SEE
 18 HAMILTON V. LEAVY, 117 F.3D 742 (1997). "WHILE NOT EVERY INJURY SOFERRED BY ONE
 19 PRISONER AT THE HANDS OF ANOTHER TRANSLATES INTO 8TH AMENDMENT LIABILITY FOR
 20 PRISON OFFICIALS RESPONSIBLE FOR VICTIM'S SAFETY BEING VIOLENTLY ASSAULTED IN PRISON
 21 IS SIMPLY NOT PART OF PENALTY THAT CRIMINAL OFFENDERS PAY FOR THEIR OFFENSES.
 22 SOCIETY AND PRISON OFFICIALS DELIBERATE INDIFFERENCE TO SUBSTANTIAL RISK OF
 23 SERIOUS HARM TO INMATE THIS VIOLATES 8TH AMENDMENT PROHIBITION, ON CRUEL AND
 24 UNUSUAL PUNISHMENT; FARMER V. BRENNAN, 511 U.S. 825, 833, 114 S.CT. 1970, 1976, 128 L.ED.
 25 2D 811 (1994) (QUOTING CORTES-QUINONES V. JIMENEZ-NETTLES, 842 F.2D 556, 558
 26 (1ST CIR. 1988)); (SEE ALSO RHODES V. CHAPMAN, 452 U.S. 337, 345, 101 S.C.T.
 27 2392, 2398, 69 L.ED. 2D 59 (1981)).

1 III DEFENDANTS USE OF EXCESSIVE FORCE VIOLATED PLAINTIFF'S
 2 8TH AMENDENT RIGHT TO BE FREE FROM CRUEL AND
 3 UNUSUAL PUNISHMENT

4 II. PRISONERS HAVE AN ABSOLUTE RIGHT, GUARANTEED BY THE 8TH AMEND.
 5 TO ~~THE~~ U.S. CONSTITUTION, TO BE FREE FROM CRUEL AND UNUSUAL
 6 PUNISHMENT, SEE U.S. CONSTITUTION, 8TH AMEND. ("EXCESSIVE... CRUEL AND
 7 UNUSUAL PUNISHMENT INFILCTED."); SEE ALSO CALIFORNIA CONSTITUTION, ARTICLE
 8 1, § 17. UNLIKE OTHER FEDERAL CONSTITUTIONAL RIGHTS, WHICH MUST BE
 9 BALANCED AGAINST SECURITY AND OTHER CONCERNS WHEN APPLIED TO PRISONERS,
 10 VIOLATIONS OF THE 8TH AMEND. CAN NEVER BE JUSTIFIED. "THE EIGHTH
 11 AMENDMENT IS NOT A 'MAYBE' OR 'SOMETIMES' PROPOSITION. TOUSSAINT V.
 12 MCCARTHY (9TH CIR. 1986) 801 F.2D 1080, CERT DENIED, 107 S.C.T. 2462 (1987)

13 A GUARD'S USE OF EXCESSIVE FORCE AGAINST A PRISONER CAN VIOLATE
 14 THE 8TH AMEND.. IN EXCESSIVE FORCE CASES, THE COURT MUST DETERMINE
 15 WHETHER THE FORCE WAS APPLIED "IN GOOD FAITH TO MAINTAIN OR RESTORE
 16 DISCIPLINE, OR MALICIOUSLY OR SADISTICALLY TO CAUSE HARM." HUDSON V. McMILLAN,
 17 503 U.S. 1, 6, 112 S.L.T. 995, 998, 117 L.ED. 2D 156 (1992); WHITLEY V. ALBUR (1986) 475
 18 U.S. 312 [106 S.C.T. 1078; 89 L.ED 2D 251]; GALT V. SONN (9TH CIR. 1987) 815 F.2D 923;
 19 ROBINSON V. MEECHAM (9TH CIR. 1991) 939 F.2D 699, 701-702. "EXCESSIVE FORCE" IS
 20 ANY PHYSICAL CONTACT BY A GUARD THAT IS MEANT TO CAUSE HARM, RATHER
 21 THAN TO KEEP ORDER.

22 12. TO DECIDE WHAT FORCE IS EXCESSIVE, JUDGES CONSIDER:

23 a. THE NEED FOR FORCE? NONE;

24 13. THE PLAINTIFF IS A 59 YEAR OLD, 150 lb. ELDERLY MAN FEARING FOR HIS
 25 LIFE, BECAUSE HE WAS UNABLE TO DEFEND HIMSELF; BECAUSE HIS WRIST WAS
 26 BROKEN (WITH PINS STICKING OUT) BY TWO ATTACKERS, PRISON OFFICIALS
 27 FAILED TO CATCH AND ~~SO~~ THEY CAN BE ON EITHER YARD. FURTHERMORE
 28 THE PLAINTIFF [O]NLY BEGGED AND PLEADED NOT TO GO TO THE YARD BECAUSE
 OF ENEMY CONCERNS (SEE UPSHAW DECLARATION). PLAINTIFF HAS ALSO

1 ONLY RECEIVED THREE RULE VIOLATIONS, A LETTER OF COMMENDATION AND
2 POSITIVE PSYCHE REPORTS IN THE LAST [25] YEARS! SEE ATTACHED DOCS..

3 b. WHETHER THE AMOUNT OF FORCE USED WAS REASONABLE GIVE THE NEED?

4 14. PLAINTIFF HAS A WELL DOCUMENT HISTORY OF ANXIETY/STRESS RELATE
5 DISORDERS. HOWEVER THAT IS NO EXCUSE FOR DEFENDANT T. DEEGAN TO
6 GRAB AND [O]JERK THE PLAINTIFF'S BROKEN ARM/WRIST THEN SPRAY HIM
7 WITH PEPPER SPRAY. THE PLAINTIFF WAS FROZEN IN TERROR "HUGGING" THE
8 BENCH. DEFENDENTS COULD HAVE CALLED A PSYCHE TO REASON WITH HIM

9 C. HOW SERIOUS THE NEED FOR FORCE APPEARED TO THE GUARDS?

10 15. DEFENDANT BOSTON CALLED THE ASSOCIATE WARDEN, THE DEFENDANT ORDERED
11 DEFENDANT SGT SIMON TO PREPARE FOR A CELL EXTRACTION, AND TO INFORM THE
12 PLAINTIFF(CELL EXTRACTION ARE VIDEO TAPE(NORMALLY)) IF DEFENDANT T.
13 DEEGAN BELIEVED THE PLAINTIFF TO BE A SERIOUS THREAT; HE MORE THAN
14 LIKELY WOULD HAVE WAITED FOR THE EXTRACTION TEAM, AS APPOSED TO POKING
15 AND PREDING THE SCARED, CRIPPLED CAGED ANIMAL.

16 d. WHETHER THE GUARDS MADE EFFORTS TO USE AS LITTLE FORCE A NECESSARY?

17 16. IS THERE ANY JUSTIFICATION FOR PULLING ON A MANS BROKEN ARM AND
18 PEPPER SPRAYING AT POINT BLANK RANGE?

19 e. HOW BADLY YOU WERE HURT?

20 17. THE DEFENDANTS AWARE OF HIS BROKEN WRIST WILLFULLY AND WANTONLY WITH
21 MALICIOUS SAIDISTIC INTENT, JERKED HIS BROKEN WRIST, PEPPER SPRAYED HIM THEN
22 DRAGGED HIM ACROSS THE PLAZA IN HANDCUFFS BY HIS BROKEN WRIST AS HE SCREAMED
23 IN PAIN ~~AND~~ SUFFERED. THEN TACKLED HIM AND CAUSED THE PINS HOLDING HIS
24 WRIST TOGETHER TO BE SHoved ALTHEWAY INTO THE BONE. PLAINTIFF ALSO NOW
25 SUFFERS FROM POST TRAUMATIC STRESS DISORDER AND LOSS OF MOBILITY IN WRIST.

26 18. THE DEFENDANT(S) ACTIONS/REFUSAL TO ACT HAVE ~~DIRECTLY~~/INDIRECTLY
27 CAUSED MR MCELROY TO NEEDLESSLY SUFFER, AND HE CONTINUES TO; THE DEFENDANT(S)
28 DELIBERATELY/CALLOUS INDIFFERENCE TO THIS UNREASONABLE RISK OF FUTURE RISK OF

1 FUTURE RISK OF SERIOUS HARM, IS IN VIOLATION OF THE 8TH AMENDMENT. FOR
2 THIS REASON, PLAINTIFF HUMBLY REQUEST THAT THIS HONORABLE COURT GRANT THIS
3 ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND A TEMPORARY RESTRAINING
4 ORDER.

5 DATED: MAY 29, 2008

6 M Marvin McElroy
7 MARVIN McELROY, C 73869

8

9 **IV VERIFICATION**

10 I, MARVIN McELROY, STATE:

11 I AM THE PLAINTIFF IN THE ABOVE STATED MATTERS. I HAVE READ THE
12 FOREGOING COMPLAINT, ORDER TO SHOW CAUSE AND MEMORANDUM OF POINT AND
13 AUTHORITIES AND THE FACTS STATED THEREIN ARE TRUE OF MY OWN KNOWLEDGE;
14 EXCEPT AS TO MATTERS THAT ARE THEREIN STATED ON MY INFORMATION AND
15 BELIEF, AND AS TO THOSE MATTERS I BELIEVE THEM TO BE TRUE.

16 I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
17 AND CORRECT. EXECUTED AT AVENAL AT KINGS COUNTY OF CALIFORNIA ON MAY 29,
18 2008.

19 RESPECTFULLY SUBMITTED

20 M Marvin McElroy
21 MARVIN McELROY

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4

5

6 MARVIN MCELROY,
7 Plaintiff,

8 v.

9 CALIFORNIA DEPARTMENT OF
10 CORRECTIONS AND REHABILITATION
JAMES D. HARTLEY, WARDEN
AVENAL STATE PRISON, et al.

DECLARATION IN SUPPORT OF
APPLICATION FOR PRELIMINARY
INJUNCTION AND TEMPORARY
RESTRAINING ORDER BY
MARVIN MCELROY
Civil Action No. _____

12 DECLARATION UNDER PENALTY OF PERJURY BY MARVIN MCELROY

13 I, MARVIN MCELROY, BEING COMPETENT TO MAKE THIS DECLARATION AND
14 HAVING PERSONAL KNOWLEDGE OF THE MATTERS STATED HEREIN, DECLARES
15 PURSUANT TO 28 USC §1746:

- 16 1. I, PLAINTIFF, MARVIN MCELROY, SUFFERED AND I CONTINUE TO SUFFER
17 IRREPARABLE PHYSICAL INJURY AND I CONTINUE TO SUFFER, SEVERE EMOTIONAL
18 AND PSYCHOLOGICAL DISTRESS.
- 19 2. JULY 6, 1993 AT DIVSP MARVIN MCELROY RESCUED LT. GIOTTONINI WHO
20 WAS BEING ASSAULTED BY ANOTHER INMATE (see EXHIBIT 'I'). PRISON
21 OFFICIALS LATER TRANSFERRED MR MCELROY TO MCSP, AFTER LEARNING
22 THE BLACKS AND WHITE WERE ORCHESTRATING A 'HIT' ON HIM.
- 23 3. MR MCELROY, A LIFER, WAS HOUSED IN A LIFER HOUSING UNIT WHERE THE
24 INCIDENT TOOK PLACE. MARVIN BELIEVES THESE LIFERS CALLED THE HIT.
- 25 4. IN 2002 AT MCSP HE SUFFERED A BROKEN KNEE, AFTER HIS CELLY HAD
26 LEARNED THAT ^{HE} HELPED A 'COP' (see EXHIBIT 'O') HE CAN NEVER RUN AGAIN.
- 27 5. JANUARY 26, 2008 AT ASP'S-HU 420, HIS WRIST WAS BROKEN BY TWO INMATES
28 WHO LEARNED HE HELPED A 'COP'. THEY CALLED MARVIN A "COP" BEFORE

1 THEY ATTACKED HIM. HE CAN NO LONGER BEND HIS WRIST BACK; THEREBY
2 EVEN FURTHER LIMITING THE EXERCISE HE CAN DO (SEE EXHIBIT 'N').

3 2. FURTHERMORE HIS ATTACKERS ARE STILL AT LARGE AT ASP 3/4 YARDS.

4 2. PLAINTIFF HAS TRIED TO NOTIFY DEFENDANT(S) THAT HE IS APPLYING FOR A
5 TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION; BUT ASP PERSONNEL
6 HAVE DENIED HIM AND OTHER INMATES THEIR RIGHT TO CONFIDENTIALLY CORRESPOND
7 WITH PRISON OFFICIALS AS DEFINED BY AND AFFORDED INMATES UNDER THEIR
8 OWN 18 CCR § 3141.

9 a. MAY 19 PLAINTIFF TRIED TO SERVE NOTICE ON THE DIRECTOR OF CORRECTIONS
10 BUT IT WAS RETURNED WITH PART OF THE ADDRESS [B] LACKED OUT (SEE
11 EXHIBIT 'Q').

12 b. HE HAS ALSO TRIED TO SERVE NOTICE ON ASP'S WARDEN HARTLEY, HARTLEY
13 HAS NOT REPLIED/RESPONDED.

14 c. PLAINTIFF UPON INFORMATION AND BELIEVES, AND THEREON ALLEGES, THAT THE
15 DEFENDANT(S) EMPLOYEES AND COWORKERS, ONGOING, ILLEGAL PRACTICES ARE
16 PURPOSELY DONE TO ASP'S INMATES TO DISCOURAGE INMATES FROM
17 EXERCISING THEIR 1ST AMENDMENT CONSTITUTIONAL RIGHTS (SEE WALTON
18 DECLARATION #2)

19 3. THERE IS NO SAID ADEQUATE REMEDY AT LAW TO PROTECT MR MCELROY
20 FROM SAID RETALIATION, AND WITHOUT THE EQUITABLE RELIEF SOUGHT HE
21 IS SUSCEPTIBLE TO EVEN FURTHER GREAT IRREPARABLE INJURY. MONEY
22 DAMAGES WILL NOT FIX HIS INJURIES.

23 4. FURTHERMORE PLAINTIFF IS LIKELY TO SUCCEED AT TRIAL; AND A PRELIMINARY
24 INJUNCTION/RESTRAINING ORDER WILL SERVE THE PUBLIC INTEREST.

25 I DECLARE UNDER PENALTY ^{OF PERJURY} THAT THE FOREGOING IS TRUE AND CORRECT.

26 EXECUTED AT AVENAL AT KING'S COUNTY OF CALIFORNIA ON MAY 29, 2008

27 Marvin McElroy
28 MARVIN MCELROY

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

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6 MARVIN M^CELROY,
7 Plaintiff,

8 v.

9 AVENAL STATE PRISON et al.,

10 JAMES D. HARTLEY, WARDEN,
11 Defendant(s).

DECLARATION IN SUPPORT OF
REQUEST FOR PRELIMINARY
INJUNCTION BY
MARVIN M^CELROY, CDC#C73869
Civil Action No. _____

12 DECLARATION UNDER PENALTY OF PERJURY OF MARVIN M^CELROY

13 I, MARVIN M^CELROY, BEING COMPETENT TO MAKE THIS DECLARATION AND
14 HAVEING PERSONAL KNOWLEDGE OF THE MATTERS STATED HEREIN DECLARES
15 PURSDANT TO 28 USC § 1746:

16 1. NOV. 21, 2008, I WAS TRANSFERED TO ASP FROM MCSP. WHEN I ARRIVED AT
17 ASP'S 'R-N-R', MYSELF AND THE OTHER INMATES WERE GIVEN OUR PROPERTY AND
18 NEW STATE CLOTHES. NEXT SGT DOE AND TWO OTHER OFFICERS, ONE WAS C/D
19 LOPEZ ('MS'), TOOK US TO A CLASSROOM AND GAVE US A SPEECH! ON HOW TO PROGRAM
20 AT ASP. MS. LOPEZ SAID, THAT THERE IS, ONLY TWO SNY (3 AND) YARDS; AND IF YOU
21 OWE SOMEONE/YOU ARE IN DEBT(?) PAY-UP! BECAUSE! THE WORD WOULD GET BACK,
22 TO THE OTHER YARD, ABOUT YOU! AFTER THAT SPEECH, ON RULES! WE WERE TAKEN TO
23 OUR NEW HOUSING UNIT. FOR ME IT WAS 42D.

24 2. AFTER A FEW DAYS IN 42D, I SAW RAYMOND MARTINEZ, AN INMATE FROM MCSP. WE
25 BOTH WAS ON THE SAME YARD 'B' (AT MCSP) AND WE STARTED TO TALK, AND HE BROUGHT-
26 UP, THAT HE KNEW ABOUT "THE GOOD GUY CHRONO" (LETTER OF COMMENDATION) AND WE
27 HAD PROBLEMS, BECAUSE, HE WANTED ME TO GET SOME COLOR PENCILS IN MY FIRST AND
28 ONLY PACKAGE! THE PACKAGE CAME TO ME, BUT WITH WRITING PAPER AND NO COLOR PENCILS.

1 SO WE FELL OUT, OVER THAT AND STOP SPEAKING TO EACH OTHER.

2 3. AROUND NOV/DEC '07, I WAS DUCETED TO SEE PSYCHE DR. OLSSEN! WHEN I TOLD HIM
 3 ABOUT MY "GYM [E]XCLUSION CHRONO" THAT I HAD, FROM MCSP AND I ASKED IF HE WOULD
 4 CALL THERE AND TALK WITH "MR. OLSSEN". HE SAID YES. LATER I WAS DUCETED TWO MORE
 5 TIMES TO SEE ANOTHER (PSYCHE) AND A WOMEN. I TOLD THEM THE SAME STORY ABOUT
 6 MY EXCLUSION CHRONO.

7 4. JAN. 26, 2008 10AM I HEARD SAY[COP] TO ME, AND THEN, I WAS ATTACKED BY TWO
 8 INMATES. THE TWO OFFICERS (HARRIS AND ROCHA) ALLOWED THEM TO GET AWAY! AND NOT
 9 KNOW WHO THEY ARE/WE'RE? AFTER THE ATTACK ON ME, I WAS FINISHED!

10 5. I WAS TRANSFERRED TO FRESNO HOSPITAL, WITH A BROKEN WRIST!

11 6. I RETURNED, BACK TO PRISON, THAT SAME DAY, BUT 8PM TO O.H.U. PHARMACY
 12 WHERE TWO OFFICERS, WERE WAITING ONE OF THEM WAS MS. LOPEZ SHE GAVE ME MY
 13 LOCK-UP PAPERS AND PROPERTY LIST PAPER. LATER THAT NIGHT I WAS REHOUSED IN AD SEG.

14 7. MARCH 6, 2008 I WENT TO COMMITTEE HEARING TO FA3, I TOLD COMMITTEE
 15 MEMBERS OF ENEMY CONCERN. THEY BELIEVED I DIDN'T HAVE ANY! OVER ON 3 YARD.

16 8. MARCH 9, 2008 I LEFT AD-SEG AND WALKED TO FA3, WHERE I SAW TWO MORE ENEMYS.

17 9. I TOLD THE LT., HE TOLD STAFF TO TAKE ME TO CLINIC FOR 7217 REPORT, AND THAT
 18 WAS DONE SGT SIMON TOLD HIS STAFF ABOUT TO ORDER ME TO SIT ON THE BENCH OUTSIDE,
 19 FOR AWHILE. TWO HOURS LATER SGT SIMON ASKED ME TO GO TO THE GYM. I REFUSED ON
 20 ENEMY CONCERN! SO HE! SAID TO ME, I DON'T CARE, IF YOU STAY, ALL NIGHT OUT HERE. SO
 21 AFTER THAT, I LEFT THE BENCH, AND STARTED TO WALK THE YARD, ALL THE TIME, BEING
 22 FOLLOWED BY STAFF. I THEN WALKED TO ANOTHER HOUSING UNIT, THEN SGT SIMON TOLD HIS
 23 STAFF MEMBERS TO PLACE HANDCUFFS ON ME, AND TAKE ME TO THE PROGRAM OFFICE. I
 24 WAS THEN PLACED IN THE MENTAL WARD TILL ABOUT MARCH 11/12/13, 2008. A SGT CAME TO
 25 INTERVIEW ME, ON MY, ENEMY CONCERN ON 3 YARD.

26 10. MARCH 14, 2008 ANOTHER SGT CAME TO VISIT ME, AND TOLD ME, THAT I WAS GOING
 27 BACK TO AD SEG NOT 3 YARD!. SO I LEFT THE MENTAL WARD, WITH SGT TO BE PLACED
 28 IN THE O.H.U PHARMACY, HOLDING CELL.

1 11. THEN I MET C/D DEEGAN!

2 I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
3 AND CORRECT, EXECUTED AT AVENAL AT KINGS COUNTY OF CALIFORNIA ON MAY 29
4 2008.

5 Marvin McElroy
6 MARVIN McELROY
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

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6 MARVIN M'ELROY
7 Plaintiff

8 v.

9 CALIFORNIA DEPARTMENT OF
10 CORRECTIONS AND REHABILITATION
11 JAMES D. HARTLEY, WARDEN
AVENAL STATE PRISON, et al.,
Defendant(s)

DECLARATION IN SUPPORT OF
APPLICATION FOR PRELIMINARY
INJUNCTION AND TEMPORARY
RESTRANDING ORDER BY
MARVIN M'ELROY
Civil Action No. _____

12

13 DECLARATION UNDER PENALTY OF PERJURY BY MARVIN M'ELROY

14 I, MARVIN M'ELROY, BE COMPETENT TO MAKE THIS DECLARATION AND HAVING
15 KNOWLEDGE OF THE MATTERS STATED HEREIN, DECLARES PURSUANT TO 28 USC
16 § 1746:

17 1. MAY 15, 2008 WHILE I WAS IN MY CELL, C/O FUGUNDES CAME TO THE DOOR
18 AND HE ASKED ME IF, I WAS TO HAVE CANTEEN TODAY? I SAID NO. THEN ~~HE~~ I
19 SAID I HAVE NO MONEY. THEN ^{HE} TOOK MY CELLY OUT OF OUR CELL, SO HE COULD PICKUP
20 THE LEGAL DOCUMENTS OUT OF HIS TWO BOXES, OF HIS PROPERTY (SEE WALTON DECL. #1)
21 C/O FUGUNDES BROUGHT INMATE C. WALTON BACK TO THE CELL, C/O HASKEL, WAS
22 GIVING ME MY CANTEEN THROUGH THE FOOD HOLE IN THE DOOR. FUGUNDES SAID, TO ME. I
23 THOUGHT, YOU SAID, YOU DIDNT HAVE ANY MONEY? I RESPONDED BY SAYING THAT, "I GET ALL
24 MY MONEY, FROM [M]S. GREEN." THE C/O FUGUNDES LEFT MY DOOR.

25 2. THEN IN 3 MINUTE, C/O FUGUNDES WAS BACK AT MY CELL DOOR, AND SAID TO ME THE
26 CAPTAIN WANTED TO SEE ME, SO PUT HANDCUFFS ON ME AND BROUGHT ME TO THE
27 LT. DUVALL OFFICE, WHERE I STOOD IN THE MIDDLE OF C/O FUGUNDES AND LT DUVALL
28 AND [IN]URSE GREEN.

1 3. THEN C/O FUGUNDESS STARTED ANSWERING (?ASKING) ME QUESTIONS ABOUT WHERE
 2 I GET MY MONEY FROM. AND DID I SAY THAT [N]URSE GREEN GAVE ME MONEY
 3 FOR MY CANTEEN? I RESPONDED TO C/O FUGUNDESS QUESTIONS IN FRONT OF THE LT. DUVALL
 4 AND NURSE GREEN, BY SAYING TO THEM. [N]URSE GREEN HAVE NEVER GAVE ME ANY
 5 MONEY OR NEVER PUT MONEY ON MY BOOKS, AND I SAID THAT MY FAMILY GIVES ME MONEY,
 6 AND I SAID C/O FUGUNDESS IS TRYING TO SET-ME-UP!! BECAUSE MY CHARGES WAS
 7 DROPPED (see EXHIBIT 'Piii') AND C/O, DEFENDANT, T. DEEGAN WAS HIS FRIEND. THEN C/O
 8 FUGUNDESS SAID WHAT IF I BRING YOUR CELLY WALTON IN HERE? I SAY, TO THAT QUESTION, YOU
 9 C/O FUGUNDESS JUST HAD MY CELLY IN THE SHOWER (RETURNING HIS PROPERTY). I DONT KNOW
 10 IF YOU THREATENED HIM OR NOT, SO BRING HIM AND WE'LL SEE. SO THE LT. ASK ME, IM I
 11 CALLING HIS OFFICER A LIE. I ANSWER BY SAYING THAT C/O FUGUNDESS MADE A MISTAKE. SO
 12 LT TOLD THE C/O FUGUNDESS TO GET ME OUT OF HIS OFFICE.

13 4. SO THE C/O FUGUNDESS TOOK ME BACK TO MY CELL, AND ON THE WAY THE C/O FUGUNDESS
 14 STARTED TO BEND MY RIGHT WRIST (THE ONE THAT WAS BROKE. see EXHIBIT 'N'), UNTIL IT
 15 STARTED TO HURT ME, AND ALSO BEND IT MORE, WHILE TAKING OFF THE HANDCUFFS, THAT
 16 I YELL OUT IN PAIN, TO HIM, YOU ARE HURTING MY WRIST. HE JUST SAID TO ME, "YOU JUST
 17 WET YOUR PANTS!" (see WALTON DECLARATION #1).

18 I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND
 19 CORRECT. EXECUTED AT AVENAL AT KINGS COUNTY OF CALIFORNIA ON MAY 29, 2008.

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 21 Marvin McElroy
 22 MARVIN McELROY
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

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5

6 MARVIN McELROY
Plaintiff

7

8 v

9 AVENAL STATE PRISON, et al.,
10 JAMES D. HARTLEY,
Defendants

DECLARATION IN SUPPORT OF
APPLICATION FOR PRELIMINARY
INJUNCTION AND A TEMPORARY
RESTRANING ORDER BY
JOHN W. UPSHAW/CDC#V39102
Civil Action No. _____

13 DECLARATION UNDER PENALTY OF PERJURY BY JOHN WILLIAM UPSHAW

14 I, JOHN UPSHAW, BEING COMPETENT TO MAKE THIS DECLARATION AND HAVING
15 PERSONAL KNOWLEDGE OF THE MATTERS STATED HEREIN, DECLARES PURSUANT 28 USC §1746:

16 1. 3/14/08 I WAS AT BLD 390 IN HOLDING CELL #2. I HEARD INMATE McELROY IN CELL #1
17 CRYING OUT IN PAIN AND FEAR AND TELLING THE C/O'S HE COULD NOT RETURN TO 3 YARD.
18 THE C/O'S KEPT SAYING THAT "YOU ARE GOING WHETHER YOU LIKE OR NOT", AND THEN I HEARD
19 A CAN BEING SPRAYED (I THINK IT WAS MACE) AND McELROY CRYING IN PAIN.
20 2. AT WHICH POINT THAT C/O CAME OUT OF McELROY'S CELL #1 AND TOLD THE OFFICER
21 MONITORING ME TO GET ME OUT OF THERE, AND RETURN ME TO AD-SEG.

22

23

24 I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS
25 TRUE AND CORRECT, EXECUTED AT AVENAL AT KINGS COUNTY OF CALIFORNIA ON
26 MAY 29, 2008.

27
28 John - Upshaw
Upshaw, CDC#V39102

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4

5

6 MARVIN McELROY,
7 Plaintiff,

8 v.
9 AVENAL STATE PRISON et al.,
10 JAMES D HARTLEY, WARDEN,
11 Defendant(s),

Civil Action No. _____

DECLARATION IN SUPPORT OF
REQUEST FOR PRELIMINARY
INJUNCTION ~~BY~~
CHARLES WALTON, CDC#F48589,
PURSUANT 28 USC § 1746

12 DECLARATION UNDER PENALTY OF PERJURY OF CHARLES WALTON

13 I, CHARLES WALTON, BEING COMPETENT TO MAKE THIS DECLARATION AND
14 HAVING PERSONAL KNOWLEDGE OF THE MATTERS STATED HEREIN DECLARES
15 PURSUANT TO 28 USC § 1746:

16 1. MAY 15, 2008 APROXIMATELY NOON AT ASP H.U.140-1-14 AFTER C/O
17 FAGUNDUS BROUGHT/PUT ME BACK IN MY CELL AFTER ISSUING MY
18 PROPERTY; THEN HE LEFT AFTER ASKING MARVIN ABOUT HIS SISTER.

19 2. A FEW MINUTES LATER HE RETURNED AND COUFFED MARVIN AND
20 TOOK HIM TO THE SERGEANTS OFFICE BY THE SALLY-PORT.

21 3. ON THE WAY BACK I COULD SEE HIM PULLING MR McELROY'S RIST
22 AS HE PLEADED HIM SAYING, "PLEASE MY ARM". HE SHOVED MR McELROY
23 BACK IN THE CELL AND SAID, "YOU MESSED YOUR PANTS 'BDY'!"; THEN
24 BENT HIS WRIST AGAIN WHILE UNCOUFFING THROUGH TRAY SLOT WHILE
25 AT ME.

26 I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND
27 CORRECT, EXECUTED AT AVENAL AT KING'S COUNTY OF CALIFORNIA ON MAY 29, 2008.

28 CHARLES WALTON

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

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5
6 MARVIN McELROY,
Plaintiff,

7 v.

8 AVENAL STATE PRISON, et al.,

9 JAMES D. HARTLEY, (A) WARDEN,

10
11
12 Defendants.

13 Civil Action No. _____

14 DECLARATION IN SUPPORT OF
15 APPLICATION FOR ORDER TO
16 SHOW CAUSE FOR A
17 PRELIMINARY INJUNCTION AND A
18 TEMPORARY RESTRAINING ORDER
19 BY

20 CHARLES WALTON, F4858T

21 DECLARATION UNDER PENALTY OF PERJURY BY CHARLES WALTON

22 I, CHARLES WALTON, BEING COMPETENT TO MAKE THIS DECLARATION AND
23 HAVING PERSONAL KNOWLEDGE~~E~~ OF THE MATTERS STATED HEREIN, DECLARES
24 PURSUANT TO 28 USC §1746;

25 1. THAT ASP PERSONNEL AND OFFICIALS WORK IN CONCERT AT HINDERING INMATES,
26 ACCESS TO THE COURT/ABILITY TO EFFECTIVELY AND ADEQUATELY UTIGATE ACTION
27 IN COURT, ONCE INITIATED.

28 2. ASP STAFF/PERSONNEL DENY INMATES THEIR RIGHT TO CONFIDENTIAL
CORRESPONDENCE UNDER 18 CCR § 3141. THEREBY MAKING IT NEARLY IMPOSSIBLE TO
SERVE ANY NOTICE ON THE DEFENDANTS THAT THE COURTS MAY REQUIRE AS
PART OF RULES OF PROCEDURE, THEREBY CAUSING AN INMATE CASE TO BE DISMISSED
FOR FAILING TO SATISFY SOME TECHNICAL REQUIREMENT.

3. I HAVE PERSONALLY BEEN DENIED CONFIDENTIAL CORRESPONDENCE ON SEVERAL
OCCASIONS.

4. 1/17/08 ASP HS 350 C/D SADAC READ MY OUTGOING LEGAL MAIL VIOLATING

1 OP#009; AND HE ALSO GAVE LEGAL ADVISE, AS TO/I CAN WRITE AND HOW TO
 2 ADDRESS MY LEGAL MAIL.

3 5. 1/11/08 C/O SADAC READ LEGAL MAIL AGAIN THIS TIME C/O GOODSON WATCH HIM.

4 6. 1/22/08 C/O SANDANOL WENT THROUGH MY LEGAL PROPERTY. THE INMATES
 5 ASSIGNED TO DORM 19-S BOOKS 32L, 32M AND 34L WITNESSED HER.

6 7. 1/29/08 C/O PERINIS ATTEMPTED TO DISCOURAGE ME FROM SENDING LEGAL
 7 MAIL, ASKING/MAILING "WHO ARE YOU WINNING TO", "YOU GOT A LOT OF LEGAL MAIL".

8 8. 2/7/08 ASP HU 32D C/O'S PATTY AND WOLF TRIED TO PREVENT ME FROM
 9 CORRESPONDING ~~WITH~~ CONFIDENTIALLY WITH PRISON OFFICIALS

10 9. 3/6/08 GABRIELA RESINDEZ CAUSED CV-07-05580-SBA TO BE DISMISSED
 11 WITHHOLDING NEED CERTIFIED TRUST STATEMENT.

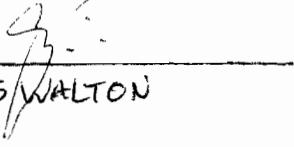
12 10. 4/29/08 ASP HU 140 C/O OLSEN HE WAS GIVEN "ORDERS" THAT INMATES ARE
 13 NOT ALLOWED CONFIDENTIAL CORRESPONDENCE WITH CAPTAIN ARLINE OR ANY OTHER
 14 PRISON OFFICIALS.

15 11. 4/30/08 HU 140 C/O DOE REFUSED TO ALLOW CONFIDENTIAL CORRESPONDENCE
 16 WITH THE CAPTAIN.

17 12. 5/14/08 HU 140 C/O M. BASS WHILE COLLECTING LEGAL MAIL ASK WHY
 18 DO WE SEND SO MUCH LEGAL MAIL; AND THAT INMATES AREN'T ALLOWED TO
 19 CONFIDENTIALLY CORRESPOND WITH "CDC STAFF/OFFICERS".

20 13. 5/15/08 HU 140 M. BASS REFUSED TO ALLOW THE PLAINTIFF, MR. McELREY,
 21 TO CORRESPOND CONFIDENTIALLY WITH A CDC OFFICER.

22 I, DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
 23 AND CORRECT, EXECUTED AT AVENAL AT KING'S COUNTY OF CALIFORNIA ON MAY 29, 2008.

24
 25 
 26 CHARLES/WALTON
 27
 28